

WAR POWERS FOR THE 21ST CENTURY: THE CONGRESSIONAL PERSPECTIVE

HEARING BEFORE THE SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT OF THE COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS SECOND SESSION

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THURSDAY, MARCH 13, 2008,

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:45 a.m. in Room 210, Cannon House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The subcommittee will come to order. Let me first welcome three distinguished gentlemen. I want to note it for the record that I have read your written testimonies, they are excellent, brilliant, and I agree with them, but let me begin, and particularly, I consider you all colleagues because Steve has been here before in a variety of capacities, and two former members, Dave Skaggs and Mickey Edwards.

Today we begin a series of hearings on what I believe is one of the most fundamental of issues that comes before us, the Congress, the first branch of government in our constitutional scheme, which is the decision to send the Armed Forces of the United States into combat.

Making such a decision is an acknowledgement that diplomacy in the international framework for conflict resolution, which the United States has in large measure created and sustained consistently since World War II, has failed.

Making such a decision means that we are compelled to use violence for our survival and way of life and that we must prepare ourselves for the eventual human losses and other tragic consequences that war entails including the inevitable strain on our economy that results from devoting our resources to war rather than to our collective prosperity.

So this is truly a momentous decision that is beyond party and must be above partisanship. I would note that in each of your testimony you drew that fact, I thought, eloquently, that this is not a partisan issue. A decision to go to war should reflect the collective judgment of both the President and the Congress.

Our Founding Fathers crafted a Constitution that gives the Commander in Chief the power to conduct wars, but reserves to Congress the power to declare war. Their view was that the judgments of many in a matter of such profound consequence are preferable to the possible whim of a single individual, and I believe they were right.

Since the end of World War II, this balance has been skewed. It has been more than 60 years since the United States actually declared war on another country, but we have engaged in hostile action on dozens of occasions, sometimes in partnership, when Congress has worked with the executive, and formal authorization by this branch of government has been part of that process.

There have been other cases, however, in which there has been a unilateral decision by the executive to send troops into combat. Restoring the balance and vision by the Founders will most likely require not only legislative changes but also a recognition of the wisdom of the Founders as well as a reinvigorated awareness of the constitutional responsibility on the decision to use military force, our responsibility.

The confluence of the war in Vietnam and President Richard Nixon's unparalleled clings to executive power provoked a response by that Congress that led to the enactment over his veto of the War Powers Act. However, Congress since then has not only abdicated its constitutional responsibility but also has failed to insist on compliance with the war powers legislation that it had enacted by an overwhelming majority.

The truth is that the War Powers Act has never really worked. In fact, according to the Congressional Research Service there have been over 120 presidential filings consistent with, and that is a legal term, the War Powers Resolution, but only one that started the 60-day clock for congressional approval pursuant, and, again, that is a term with legal meaning and import, and in at least a dozen other cases combat occurred, took place, with no notification whatsoever.

Now, we find ourselves at another moment in time, another President, with another war and another effort to usurp congressional constitutional authority. At this very moment, the Bush administration has claimed that upon the expiration of the United Nations' mandate that lapses on December 31 of this year, which is the current legal basis for our presence there, American military forces can't continue to engage in combat without returning to Congress to secure new authority.

In large measure, they base this position on the 2002 congressional resolution that authorized the use of force to remove the threat posed by the Saddam Hussein regime. My comment just recently, and I will repeat it now, is that this is a patently absurd interpretation of the 2002 authorization, has no basis in fact and is an affront to the constitutional role and responsibility of the United States Congress.

Therefore, this argument about congressional and executive war powers is not an academic exercise. It is very real, with very profound consequences for this country. I would submit that now more than ever that this is a moment in our history to reengage on this issue of the constitutional responsibility of the Congress in its relationship with the executive.

Let me turn to my friend and ranking member, the distinguished and open-minded gentleman from California, Mr. Rohrabacher, for any remarks he may choose to make. Before I do that, Dana, let me note that it is with deep regret that this is our subcommittee's

last hearing with your subcommittee staff, the lovely and talented Phaedra Dugan.

She has absolutely been a joy to work with, and she has navigated a difficult path representing your interests while working in a friendly and cooperative spirit with myself and my staff on those very rare occasions when we have disagreements on policy.

Phaedra, given the superior resources that is at the disposal of the majority, you have been out-numbered, but you certainly haven't been outwitted. On behalf of the entire subcommittee and our staff, we wish you the very, very best and want to extend to you our very sincere and genuine gratitude for your service. Good luck.

Mr. Rohrabacher.

Mr. ROHRABACHER. Well, thank you for those kind remarks to Phaedra. We have been battling the enemy together, and that doesn't mean you are the enemy.

Phaedra, yes, I echo everything the chairman—thank you for those very good thoughts, Mr. Chairman. I owe Phaedra a great deal. I am someone who always speaks his mind, and sometimes it is very difficult to help someone who always speaks his mind get organized. Phaedra always makes sure that I am organized, so that is why I am going to be a little scattered from now on, except for my friend, Paul Berkowitz, who is going to be taking Phaedra's place.

Mr. Chairman, I want to thank you for holding this hearing, and I want to thank you for bringing up this issue. Deciding whether or not our nation goes to war is a tremendous responsibility. I agree with you that we need to determine if the current process works for America and whether or not it is in the year in our day.

What we are having to confront today is that the system is still capable of protecting the rights of the American people, to making sure that decisions as significant as going to war and engaging in military operations, that decisions are made in a way that reflects the democratic nature of our society.

I understand your genuine nonpolitical need to know if the current law goes far enough in stipulating whether or not Congress has the rightful powers that were conceived of by our Founding Fathers in making such fundamental decisions. We need not go back far in history to discover that this body has somewhat of a debilitating reluctance to take responsibility when deciding whether or not to commit our nation to military action.

In 1999, when President Bill Clinton sent our military forces in to battle the Bosnian Serbs, the House of Representatives rejected authorization by a vote of 213 to 213. Then the House defeated a measure declaring a state of war between the United States and the Federal Republic of Yugoslavia. Then we defeated a measure directing the President to remove the United States Armed Forces from operations against the Federal Republic of Yugoslavia.

Then both Houses of Congress agreed to emergency supplemental appropriations in order that the President would have plenty of money to conduct military operations in the Republic of Yugoslavia. Talk about having it both ways. We were making lots of decisions, but we weren't making consistent decisions about anything.

Mr. Chairman, I applaud you for your well thought out initiative to hold this hearing and to look at alternatives to what we are dealing with today in terms of process. I commend your most sincere efforts to learn more about the process from constitutional, congressional and from executive perspectives.

I strongly agree with you that Congress should not be just a rubber stamp for the executive in decisions concerning war or concerning the use of the military, but we also have to respect the fact that this is a political body, and we have to do some soul searching of Congress itself which are we or are we not a political body that seems to be polarized and somewhat paralyzed in our decision making?

We become interested in a War Powers Act that comes up only when? When we are against a certain conflict. Or, if we are in favor of certain conflicts, then we just ignore the War Powers Act when no one challenges it then. Well, the polarization in this body does not lend itself, I believe, to the tough decision making necessary when it comes to determining what the use of America's military will be.

With military operations that have long-term implications it should not be something that Congress is going to politicize. We have to recognize that right now that if the Congress does have a decision and against a certain action that we have powers already granted to us that will permit us to stop military operations that we believe are not in the interest of the American people.

The power of the purse to cut off funding from any operation was granted to us by the Constitution. Any military operation that does not have Congress' approval can be ended by cutting off the funds for that military operation. We have that power. It is very simple, very direct, we have got it. That power is granted to us by the Constitution of the United States.

It was envisioned by our Founding Fathers. If we do not use it, it is very difficult for me to go along with an idea. If we don't use the power that we have got to end a conflict it is difficult for me to go along with the idea that we should then expand those powers in some way and give Congress even more authority or make the system more complicated and that that is going to help things and that is going to cure the problem.

Now, I am looking forward to hearing from our witnesses. I am open-minded, I am a person of strong opinions, but I also am a person that can change his mind. I am at this point not inclined to be supportive of the idea that we should be expanding this law.

So I appreciate the hearing very much. By the way, I see some old friends as witnesses and appreciate you creating such a high level of discussion. Thank you very much.

Mr. DELAHUNT. The gentleman from Missouri, the vice chairman of this subcommittee, Mr. Carnahan.

Mr. CARNAHAN. Thank you, Mr. Chairman. I want to thank you and the ranking member for holding this series of hearings on the war powers. This is an issue that like many of my colleagues I believe is long overdue to be reexamined and revisited. Under our Constitution, the war powers are divided between Congress and the President, Congress having the power to declare war, raise and

support the Armed Forces, while the President is Commander in Chief.

Congressional concern about this balance intensified after the Korean conflict, and especially during the Vietnam War, and it was in that environment in 1973 that Congress passed the War Powers Resolution over the veto of then President Nixon. The main purpose was to establish procedures for both branches to share in decisions that might get the United States involved in war.

It was in that environment, also, that I am very proud to acknowledge my former home state United States Senator and friend, the late Tom Eagleton. He was one of the original champions of establishing Congress' authority regarding war powers.

In a letter that he wrote prior to his death, which was read at his memorial service, he wrote:

"I am proud of the original version of the War Powers Act, which had it been enacted as the bill left the Senate would have reestablished the shared powers of the President and the Congress when our nation went to war. This is what our Founding Fathers envisioned."

I believe his words still ring true today. I look forward to this series of hearings, I look forward to hearing the testimony and remembering the wise guidance of Senator Eagleton. I would like to thank each of you for being here today and look forward to hearing what you have to tell us. Thank you.

Mr. DELAHUNT. Yes, thank you, Mr. Carnahan. I want to welcome a guest, my good friend and a good friend of Mr. Rohrabacher, Congressman Walter Jones of North Carolina, to the dais and ask unanimous consent that he be permitted to sit as a member of the subcommittee today for purposes of taking testimony and asking questions.

Mr. ROHRABACHER. If I could—this is, I am not sure what the right wording is here—object for a moment,

Mr. DELAHUNT. You may object for a moment, Mr. Rohrabacher.

Mr. ROHRABACHER. For a moment, just to give me the opportunity to say good things about Walter.

Mr. DELAHUNT. Take all the time you want.

Mr. ROHRABACHER. Let me commend you, Mr. Chairman, for the work and the cooperation that you have had with Walter Jones. I consider Walter to be one of the great moral leaders of the United States Congress and a man who, while I have some disagreements with, the fact is that he is one of the people I respect the most in the United States Congress.

So I am very, very pleased that you worked in cooperation with him on this legislation, and, as I say, where I might have some disagreements, the fact is that both you and Walter, but particularly Walter, is a man who I admire, and I am very, very pleased that he is here with us today. I withdraw my objection.

Mr. DELAHUNT. Well, thank you, Dana. I think you know that I concur in your assessment of Walter Jones. He is truly an American patriot, and he has the respect of the entire membership. He has taken some very difficult stands, but his integrity is of such an order of magnitude that I refer to him as the conscience of the United States Congress.

My respect for him knows no bounds. If Jack Kennedy was alive today, I think he would devote a chapter in his book, *Profiles in Courage*, to Walter Jones of North Carolina.

Now, let us turn to the first panel. For today's hearing we will benefit from the expertise of former Members of Congress and former staff. Future hearings will bring to bear the expertise of constitutional scholars and former executive branch leaders.

So we are honored to have with us today our former colleagues, David Skaggs, whom I had the honor to serve with for a term, maybe two, and Mickey Edwards, whom spent some time in the Boston area and also is widely admired and respected. They are the two chairs of the War Powers Commission of the Constitution Project whose thoughtful and provocative report members of the subcommittee will find in their packets.

I would commend it as mandatory reading for every member that comes and serves in this, the first branch of our Government. After distinguished congressional careers, they evolved to a much higher life form as professors at the University of Colorado and Princeton, respectively.

Since then, Congressman Skaggs has become the executive director of the Colorado Department of Education, and Congressman Edwards has become the director of the Aspen Institute's Rodel Fellowships in Public Leadership. We are grateful for their presence today and look forward to their testimony and hear about the workings of the distinguished commission that was assembled.

We are also pleased to have with us Steve Rademaker, whose long career in government includes service as counsel to this committee in the reign of Chairman Ben Gilman and appointment as Assistant Secretary of State, the responsibility for arms control matters. Now the senior counsel at Barbour, Griffin & Rogers, Mr. Rademaker continues to serve as the U.S. Representative on the U.N.'s Disarmament Advisory Board.

Steve, it is good to see you once more. So, gentlemen, thank you for coming, and please provide us the benefit of your experience and expertise on this important issue. Let us begin with Dave Skaggs.

STATEMENT OF THE HONORABLE DAVID E. SKAGGS, CO-CHAIR, THE WAR POWERS COMMITTEE, THE CONSTITUTION PROJECT (FORMER U.S. REPRESENTATIVE FROM THE STATE OF COLORADO)

Mr. SKAGGS. Good morning, Mr. Chairman, Ranking Member Rohrabacher. It is a pleasure to be with you all this morning, and I very much appreciate the opportunity to share some thoughts with you about the war powers provisions in the Constitution and the way we all struggle with the proper implementation of those in the national security environment the country faces these days.

I am particularly happy and honored to be here with Mickey Edwards, my friend and with whom I enjoyed the privilege of co-chairing the Constitution Project's War Powers Initiative. It was a bipartisan group that we believe did some pretty good work. I was going to ask that our report be included in the record, but if the members already have it, it is probably too bulky to send to the Government Printing Office.

I hope you have had a chance to take a look at it. As with you, Mr. Chairman, I think this is the right time to engage on this subject. The circumstances in which Congress acted to authorize force, both in Afghanistan and Iraq, are still fresh enough in our minds to be an easy reference.

The consequences of those decisions are still unfolding depending on how you read the situation around the world in Iran and elsewhere. Maybe there is some time now before Congress again has to face up to its war powers obligations, so I hope this is an appropriate environment where we can bring both passion and dispassion to bear on what is always a vexing issue for the Congress and the country.

I think it also the right time to deal with this subject because we are living in the back wash of a concerted 7 year effort by the current administration to enhance executive powers at the expense of legislative and judicial branch powers.

I pray that there are Members of Congress around here typically known as institutionalists and that they may enjoy a revival that will again see bipartisan efforts to stand up proudly for the constitutional prerogatives of the first branch.

The Founders counted on the competitive ambitions of the three branches to make checks and balances work, and without the kind of robust assertion of its constitutional interests, Congress may see powers granted to it by the Constitution atrophy or, as has lately happened and pointed out by the chairman in your opening comments, see them migrate ignominiously to the executive.

Mickey Edwards' statement, which I have read, and the War Powers Initiative Report, I think go over the constitutional history and historical context and a lot of legal and precedential arguments. I won't attempt to cover those again myself.

So I would like to cut to the chase, and that is this: Except in very limited circumstances, it is the Congress' inalienable responsibility and duty to determine when the nation uses force abroad. It is not enough for the President to check in with Congress through some consultative process. The power to initiate war does not belong to the President.

The power and responsibility belongs right here. It belongs to the people's representatives in the Congress. It is not to be denied any more than it is to be avoided.

James Madison was as determined as anyone to warn against and avoid the danger of vesting in any one person this awesome power, and he explained it nicely to Thomas Jefferson, and I quote:

"The Constitution supposes what the history of all governments demonstrates, that the executive is the branch of power most interested in war and most prone to it. It, the Constitution, has accordingly with studied care vested the question of war in the legislature."

I don't want to get trapped into a kind of 18th century absolutism about this. Times certainly have changed. We do have to read the Constitution's war powers in the light of current reality. I commend the committee, the initiative's report and its addressing of the kind of nuanced situations we face these days, especially when nonstate terrorism is likely to be the greatest threat.

Congress needs to address those cases in a way which respects its war power authority but also takes into account the operational need for the President to act against imminent threats. That necessarily will entail some delegation of authority to use force, but a limited delegation under conditions defined in law as precisely as possible and with requirements for immediate accountability.

This will require some deft drafting, but the complexity of such cases should not be an excuse for Congress to punt the constitutional ball to the President. Some here today may remember our former colleague from Illinois, the late Charlie Hayes. When things would get a little rambunctious in the House chamber we could count on Charlie in one of the back rows to give out the cry for regular order!

We need now a sense of regular order about war powers. There should be an accepted presumption that this is Congress' call; a matter certainly to be considered at the request of the President but not at the direction of the President. How many times do we have to learn this lesson? Wars undertaken with an authentic endorsement from the people's representatives have a better prospect for success, whether military or political.

A chief executive with an understanding of this regular constitutional order should welcome, not resist it. During my time here, it was always striking and odd how when we faced a national security crisis most members became almost reflexively deferential toward Presidential power and authority.

That is understandable when the President is acting in response to an attack; however, when we are proposing to start a fight, there is no excuse. Surely, the after action examination of the intelligence used to justify the invasion of Iraq should bolster Congress' confidence in its responsibility and its capacity to examine and question the alleged grounds for war and then to make up its own mind.

If I may, Mr. Chairman, I would like to offer a couple of comments about House Joint Resolution 53, the legislation introduced by Mr. Jones of North Carolina, to replace the War Powers Resolution as it now stands. I want to commend him and his co-sponsors for their determination to try to restore regular order to this area of congressional jurisdiction.

I believe the current War Powers Resolution is a constitutional muddle. It is sort of an equal opportunity encroachment on both executive and legislative powers. It may be wishful to think we could simply repeal it, so I suspect Mr. Jones' alternative is more practical. I have made several observations about that legislation in my prepared statement.

Let me just say that my chief concern about it has to do with Section 7 and its procedures for expedited action by the Congress. If I read that section correctly, it covers privileged resolutions only when offered after the President has requested authorization to initiate military action.

That is certainly fine as far as it goes, but I think what is vitally needed beyond that is provision for expedited consideration of a privileged resolution when the President has not requested authorization. Sadly, this is more likely to be the problem Congress will face when a President is intent on taking military action but for

whatever reason does not want to submit the question for congressional review.

In those circumstances, the leadership in Congress may be reluctant to take the initiative and force the issue. If so, there needs to be a safety valve, a means for rank and file membership to force the institution to do its constitutional duty.

So a provision that parallels Section 7 in the joint resolution with expedited procedures to consider a privileged resolution introduced by a sizeable minority of members of either body should be the regular order and would go a long way to ensure against war making without representation.

John Locke noted in the “Second Essay Concerning Civil Government,” and I quote:

“The legislative Branch cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others.”

In other words, Congress cannot give away its constitutional crown jewels. Article I, Section 8, Clause 11 is certainly one of those jewels.

Those of us who studied the law may have encountered the Bramble-Bush, a title apt for this topic, by Professor Karl Llewellyn. Professor Llewellyn draws some nice distinctions in that little book about the difference between having the power to do something and having the right to do it. I may have the power to enter your property simply by stepping onto it, but without your permission I do not have the right and it is a trespass.

We have allowed the President’s power to make war to become confused with his right to make war. It is time to end the confusion. Mr. Chairman, even though I am but a former member, I hope I may still call for regular order. Thank you.

[The prepared statement of Mr. Skaggs follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID E. SKAGGS, CO-CHAIR, THE WAR POWERS COMMITTEE, THE CONSTITUTION PROJECT (FORMER U.S. REPRESENTATIVE FROM THE STATE OF COLORADO)

THE CASE FOR “REGULAR ORDER”

Mr. Chairman & Members, thank you very much for the opportunity to share some thoughts with you today about the war powers provisions of the Constitution and how properly to implement those powers in the challenging national security environment the nation faces these days.

I am honored to be here, especially in the company of my dear colleague, Mickey Edwards of Oklahoma. It was a pleasure to serve with Mickey as co-chair of The Constitution Project’s War Powers Initiative. That bipartisan committee did some pretty good work, and I hope, Mr. Chairman, it might be possible to include a copy of our report, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, in the record of these proceedings.

This is the right time to engage on this subject. The circumstances and manner in which Congress acted to authorize the use of force in both Afghanistan and in Iraq are fresh enough in our minds for easy reference. The consequences of those decisions are still unfolding. Depending on how you may read the situation in Iran and elsewhere, let’s hope there is some time before Congress must next face up to its war powers obligations. So for a while we can consider this most vexing of constitutional issues with an interesting mixture of passion and dispassion.

The time is also right to deal with this subject, because we are in the backwash of a concerted seven-year effort by the Bush-Cheney administration to enhance executive branch power at the expense of legislative and judicial branch powers. I pray

that the Members of Congress known around here as institutionalists may enjoy a revival. I hope we'll again see *bipartisan* efforts to stand up proudly for the constitutional prerogatives of the first branch.

The Founders counted on the competitive ambitions of the three branches to make checks and balances work. Without this kind of robust assertion of its constitutional interests, Congress may see powers granted to it by the Constitution atrophy or—as lately with the war powers—migrate ignominiously to the executive.

Mickey Edwards' statement and the War Powers Initiative's report amply lay out some of the historical context, the constitutional history, and the legal and prudential arguments for a strict interpretation of Article I, section 8. I will not go over those important sources of insight and understanding.

I would like to cut to the chase. That is this. Except in very limited circumstances, it is Congress' *inalienable responsibility and duty to determine when the nation uses force abroad*.

It is not enough for the President to check in with Congress through some consultative process. The power to initiate war does not belong to the President. That power and responsibility belongs right here. It belongs to the people's representatives in Congress. It is not to be denied any more than it is to be avoided.

James Madison was as determined as anyone to warn against, and avoid the danger of, vesting in any one man the awesome power to make war. As Madison explained to Thomas Jefferson, "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature."

I do not want to get trapped in an absolutist corner. This is not the 18th Century, when nations had the courtesy to begin wars with formality and armies advanced over borders in disciplined ranks. We *do* have to read the Constitution's war powers in light of present reality. And there's a fine analysis in the Initiative's report of the nuanced situations we face these days—especially when non-state terrorism may pose the greatest threat.

The Congress needs to address those cases in a way which respects its war powers authority but also takes account of the operational need for the President to act against imminent attack. That necessarily will entail a delegation of authority to use force, but a limited delegation under conditions defined in law as precisely as possible and with requirements for immediate accountability. This will require some deft drafting. But the complexity of such cases should not be an excuse for Congress to punt the constitutional ball to the President.

Some here today may remember our former colleague from Illinois, the late Charlie Hayes. When things would get a little rambunctious in the House Chamber, we could count on Charlie in one of the back rows to give out the cry for "regular order."

What we need is a sense of regular order about war powers. There should be an accepted presumption that this is *Congress'* "call"—a matter certainly to be considered at the request of the President, but not at the *direction* of the President.

How many times do we have to relearn the lesson? Wars undertaken with an authentic endorsement from the people's representatives in Congress have a better prospect for success—political and military. A chief executive with an understanding of this regular constitutional order should welcome, not resist, it.

During my time here, it was always striking and odd how, when we faced a national security crisis, most Members became almost reflexively deferential toward presidential power and authority. That is understandable with respect to a President's grasp of military realities *in the event of attack*.

However, when we are proposing to start a fight, there is no excuse. Surely the after-action examination of the intelligence used to justify the invasion of Iraq should bolster Congress' confidence in its responsibility and capacity to examine and question the alleged grounds for war—and then, to make up its own mind.

If I may, Mr. Chairman, I would like to offer a couple of comments about House Joint Resolution 53, the legislation introduced by Mr. Jones of North Carolina to replace the War Powers Resolution. I commend him and his co-sponsors for their determination to try to restore regular order to this area of congressional jurisdiction.

I hope it is correct to read section 4(a) of the bill, requiring "consultation" prior to the initiation of hostilities under paragraph (1) or (2) of section 3(a), as assuming that Congress will already have acted under section 3(a) either to declare war or to give statutory authorization. With that reading, the bill would properly reinstate the primacy of congressional authority.

That reading may be called into some question by the policy declaration in paragraph 2(a)(1) that "the decision of the United States to provide for the initiation of

hostilities by the Armed Forces, except for a limited range of defensive purposes, requires a *collective judgment* of the Congress and the President; . . .” If “collective judgment” there is meant simply to acknowledge that going to war takes *both* congressional authorization, as a matter of constitutional law, *and* a Commander-in-Chief willing to order military action, as a practical matter, then no problem. On the other hand, if this phrase is meant to suggest that the President has some share of the constitutional role in authorizing military action, I believe that is problematic.

Another troubling ambiguity is in subparagraph 4(a)(2)(C), concerning military operations under Chapter VII of the United Nations Charter. I worry that the language there could be read to mean that a President’s decision to commit U. S. forces to military action pursuant to a Security Council Resolution may somehow finesse domestic constitutional law. I believe the debate in the Senate at the time the U. N. Charter was ratified established the contrary proposition: that an international agreement cannot trump the Constitution’s war powers requirements.

The chief concern I have about HJR 53 has to do with section 7 and its procedures for expedited action by the Congress. If I read this section correctly, it covers privileged resolutions only when offered *after* the President has requested authorization to initiate military action. That is fine, as far as it goes.

What is vitally needed, in addition, is provision for expedited consideration of a privileged resolution when the President has *not* requested authorization. Sadly, this is more likely to be the problem Congress will face, when a President is intent on taking military action but for whatever reason does not want to submit the question for congressional review.

In those circumstances, the leadership in Congress may be reluctant to take the initiative and force the issue. If so, there needs to be a safety valve—a means for the rank and file membership to force the institution to do its constitutional duty. A provision that parallels section 7, with expedited procedures to consider a privileged resolution introduced by a sizeable minority of members of either body, should be the regular order and would go a long way to insure against war-making without representation.

John Locke noted in the *Second Essay Concerning Civil Government*: “The legislative [branch] cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others.” In other words, Congress cannot give away its constitutional crown jewels. Article I, section 8, clause 11 is one of those jewels.

Those of us who studied law may have encountered *The Bramble Bush* by Karl Llewellyn. Professor Llewellyn draws some nice distinctions in that little book about the difference between having the *power* to do something and having the *right* to do it. I may have the *power* to enter your property simply by stepping onto it, but without your permission I do not have the *right*, and it is a trespass.

We have allowed the President’s *power* to make war to become confused with his *right* to make war. It’s time to end the confusion. Mr. Chairman, though a *former* Member, I hope I may still call for regular order.

Mr. DELAHUNT. Thank you so much, Congressman Skaggs.
Congressman Mickey Edwards, please.

STATEMENT OF THE HONORABLE MICKEY EDWARDS, CO-CHAIR, THE WAR POWERS COMMITTEE, THE CONSTITUTION PROJECT (FORMER U.S. REPRESENTATIVE FROM THE STATE OF OKLAHOMA)

Mr. EDWARDS. Thank you, Mr. Chairman, Mr. Rohrabacher. First of all, let me say I will be very deferential to you, Mr. Chairman, since you are now my congressman. Dana, I had the opportunity, I was at Georgetown and happened to have the television on and saw a special order talk you gave on this subject which I thought you did a great job, and I was very appreciative of it.

I want to say to Mr. Carnahan, you know, I am a big fan of your sister’s, the Secretary of State of Missouri, so it is good to see you here.

I sat in this room for a long time as a member of the Budget Committee, whose quarters you have momentarily taken over, and we debated, I thought, a lot of very significant issues of the time,

but none of them, none of the issues we ever talked about in the Budget Committee were nearly as important as the one that you are talking about today.

It is one of the most fundamental issues ever facing the Congress or facing the country. You have got my statement, you read it. I agree with everything my friend, David Skaggs, has said and want to associate myself with his remarks, so let me just make a couple of additional observations, if I could, and we will be prepared to answer questions.

One of the things I have noticed, I run a program now for the Aspen Institute that teaches leadership, and we were struck by a film, Kenneth Branagh's film of Henry IV. Henry IV is of course considered one of the great leaders. The British people consider Henry IV a great leader, and one of the things that made him a great leader was his leadership in war where he managed to conquer France and unite France and Britain.

People would point to him and say, you know, now, that is leadership. Well, it was leadership, but it was not leadership of the kind that you expect in this country because it was leadership where a ruler sat down with a small group of advisors and decided, "Let us go to war." The people themselves, the people who would be sent off to fight and to die, had no say in it. Their only job was to kill or be killed.

What makes this country different is that in other countries preceding the United States you had subjects and you had their rulers. When this country was founded, as a very fundamental break from the past, our Founders said, "We are not going to have rulers and subjects, we are going to have citizens and their government."

The difference was that rulers could tell their subjects what to do. In this country, citizens are supposed to tell their government what to do, and they do it through this body. They do it through the Congress. This is how the people govern. Bernard Crick, who is a British historian and scholar, you know, wrote a book called, *In Defense of Politics*.

He said that politics is the way a free people govern themselves. It is through you that the people set their own fate. There has been a lot of talk about Congress' rights and Congress' authority, and whether or not Congress' authority is being usurped. That expression was used before. This is not about usurpation by the executive.

All Presidents try to usurp power. That is human nature. The problem is congressional acquiescence. The problem is there have been people who have suggested that the current President has been guilty of malfeasance. Maybe, maybe not, but this Congress has certainly been guilty of nonfeasance, of not doing its job.

The Constitution does not grant Congress rights, it grants Congress burdens, obligations, responsibilities, to be the voice of the people in deciding whether or not the American people are going to be rounded up and sent off to die in a war without the approval of the people themselves through you.

One place where I would suggest that there is, even in Walter Jones' excellent work, you know, and I am just as proud of you, sir, as Chairman Delahunt expressed, but there is a tendency as we try to finesse the situation and make it as nice as possible to talk about shared power. This is not a matter of shared power.

Under the Constitution, the President of the United States has the authority to manage war, to direct the actions of the military, but not, there is no shared power about deciding whether we go to war. That is entirely, entirely, the job of the Congress. The President may or may not recommend going to war.

We have looked at the situation today, and we say well, you know, but this is different. We face a great threat. We face an enormous threat. You know, I don't dismiss the danger of possible attacks by Al Qaeda or other terrorist groups, and they could be very disastrous, but, you know, at the time the Constitution was written in 1787 we faced both Britain and France with the power, had they decided to focus on the United States, of strangling this country in the crib.

They could have wiped us out. We had a great man about to become President, George Washington. With George Washington about to assume the Presidency and two countries ready to wipe us out if they so chose, the Founding Fathers said we are still going to withhold from the Presidency the powers that kings have traditionally held.

So that is why the Constitution is not vague about who declares war. Not vague at all. In fact, you know, if you look at the Constitution, and I am sure you do, it even includes given the Congress the authority over treatment of prisoners, which people here seem to have forgotten.

So let me just close with this. I am partisan, I am a Republican. I was chairman of the Republican Policy Committee when I was in the House, part of the Republican leadership. I prefer Republican policies, but political party loyalty cannot trump the Constitution.

Loyalty to a President of your own party when it violates the constitutional principles is acquiescence in something that violates the oath of office every Member of Congress takes—that there is no excuse for taking the oath, saying I am going to uphold the Constitution. We all did that, right? I am going to uphold the Constitution.

You take loyalty to the United States and its Constitution, not to a President. We have seen too often a tendency of Members of Congress to line up with the quarterback as opposed to lining up with the Constitution. So I commend what you are doing. I think this hearing is tremendously important.

I am so glad, Mr. Chairman, that you called this hearing. Mr. Rohrabacher, I am very proud of some of the comments you have made in this area. Hopefully this will be the beginning of a Congress that will, in fact, get back the backbone to stand up for the principles it was obligated to stand up for when you ran for office, when you took the oath of office and stepped out of your role as a candidate representing a party and became law makers under the Constitution. Thank you.

[The prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF THE HONORABLE MICKEY EDWARDS,¹ CO-CHAIR, THE WAR POWERS COMMITTEE, THE CONSTITUTION PROJECT (FORMER U.S. REPRESENTATIVE FROM THE STATE OF OKLAHOMA)

Chairman Delahunt, Congressman Rohrabacher, and members of the subcommittee: Thank you for inviting me to testify today on the subject of war powers. I would like to commend the subcommittee for addressing such an important issue as we face a growing host of threats abroad.

For the past six years I have served with David Skaggs as a co-chair of the Constitution Project's War Powers Committee, a blue-ribbon coalition of policymakers, legal scholars, and military experts. The membership of the Committee has included such distinguished individuals as General (ret.) George Joulwan, former Commander in Chief of the United States Southern and European Commands and former Supreme Allied Commander, Europe, NATO; James Woolsey, former Director of the CIA and former Under Secretary of the Navy; Edwin Williamson, former Legal Adviser to the Department of State; and Harold Koh, Dean of Yale Law School and former Assistant Secretary of State for Democracy, Human Rights and Labor.

As a former elected official who has spent much of his career involved in partisan politics, I joined this Committee with a firm belief that the question of which branch of government has the legal authority to send American troops into harms way is not a partisan question. It is a question that gets to the very core of our system of checks and balances, of separation of powers, and of the Constitution itself. Kings used to be able to send their subjects off to war whenever it suited their purposes. In a dictatorship, that power persists. It is central to the American republic, however, that the chief executive is specifically denied that prerogative.

The authors of the Constitution declared that the president should be the commander in chief of the U.S. military, but they also provided for a system of shared authority in the area of war powers. The power to declare war is explicitly vested in Congress in Section 8 of Article I of the United States Constitution. Giving Congress this authority was a deliberate and strategic choice: the framers of the Constitution, fearful of the royal European tradition they fled, thought it essential that those who would do the fighting and dying should have some say—through their representatives—in the decision to go to war.

Since World War II, we have veered dangerously away from this constitutional division of powers and its critical checks and balances. When President Harry Truman sent U.S. troops into war in Korea, it was the first time in history that an American president had ordered a full-scale armed conflict abroad without first seeking a declaration of war or specific authorization from Congress. Truman's move violated our constitutional system of separation of powers.

Over the past 60 years, the United States has sent troops into numerous armed conflicts, including several wars, without a single declaration of war by Congress. President Truman, for example, relied in part on authorization from the United Nations Security Council. This argument has also been relied upon by President George H. W. Bush in deciding to use military force against Iraq, and by President Bill Clinton in using military force against the Serbs in Bosnia.

Congress has passed authorizing legislation governing many of these military actions. But in practice, our nation's war powers have increasingly and perilously become concentrated in the hands of the president. If we wish to preserve the rule of law and our Constitution, we must restore the system of shared powers.

I recognize that international threats have changed dramatically since World War II and that the threat of international terrorism today requires different military strategies. But this change does not alter the Constitution's allocation of war powers, and I am troubled deeply by the ongoing efforts to usurp Congress's role.

In 2005 the War Powers Committee issued a report entitled *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*. As we urged in that report, "While new threats may change the kind of force that is authorized, the identity of the enemy, or the optimal form of authorization, [these threats] require no change in the principles by which our government should decide whether to initiate the use of force abroad." The Constitution's system of checks and balances for the exercise of war powers may be even more important today than it was in 1789.

¹The Honorable Mickey Edwards represented Oklahoma's Fifth Congressional District from 1977 to 1993. During this time he served as chairman of the House Republican Policy Committee, the party's fourth-ranking leadership position. He is a founding member of the Constitution Project's Board of Directors and Director of the Rodel Fellowships in Public Leadership at and Vice President of the Aspen Institute.

Unfortunately however, the trend that began with President Truman has continued to the present day. Whatever one's views on the merits of the decision to go to war in Iraq in 2003, the arguments made within the executive branch that the president had the unilateral authority to start a war were constitutionally unsound. Although President George W. Bush ultimately sought legislation "authorizing" him to send troops into Iraq, he did so without acknowledging the Constitution's assignment of war-making authority to the Congress and the concomitant strict limits on executive power to initiate military action absent an attack or imminent threat. Indeed, the President described his decision to seek congressional approval as a choice, not a necessity.

The correct question is not whether the authority to go to war is unilateral or shared with the Congress. The question is whether this is the president's call at all, or whether his role is simply to recommend an undertaking of war and, if the recommendation is approved by our elected representatives in Congress, to manage the conduct of the war as Commander in Chief.

Presidents of both parties have contended that the unilateral authority they assert rests both on the constitutional designation of the chief executive as commander in chief and on the War Powers Resolution of 1973. Clearly, the duty to prosecute a war as commander in chief is different from the power to decide whether or not to engage in war. Of course, the War Powers Resolution, as an act of Congress, does not displace the Constitution, and thus Congress retains the sole authority to decide whether or not we go to war. Further, the War Powers Resolution can be overturned, permanently or in a specific instance, if Congress so decides. In so many of our decisions to make war, there has been no superseding necessity involved—no invasion of one state by another, no treaty obligation to be fulfilled, no attack on an American fleet or fort, no immediate threat—that might be used as an argument to justify a violation of the constitutional order.

The Constitution dictates that the president must seek and obtain advance authorization from Congress for initiating the use of force abroad, except for a limited range of defensive purposes, such as defending against an actual attack on the United States. The Constitution does not prescribe what form this congressional approval must take, but it does require that Congress act either by formal declaration or by statute. To comply with the Declaration Clause, the authorization for the use of force must be clear and explicit.

Moreover, Congress's war powers are not limited to the power to declare war. After authorizing the use of force, Congress is also empowered and charged with the responsibility to conduct regular oversight of the use of force and, where necessary, to revise or rescind the authorization. In addition, the authority "to raise and support Armies" and "to provide and maintain a Navy" gives Congress a powerful check on the prosecution of war and the use of force, by giving it primary authority to fund the machines of war. The power of the purse not only enhances the check of requiring advance authorization by Congress, it also provides a subsequent check by enabling Congress to stop the use of force by cutting off its funding. Today, that check is augmented by the Anti-Deficiency Act, which prohibits an expenditure or obligation of funds not appropriated by Congress and by legislation that criminalizes violations of the act.

Absent attack or overwhelming urgency, if Congress fails to fulfill its constitutional role and yields to the president's claim of authority, it will have allowed our country's war-making power to be transferred away from the branch the Constitution prescribes. If such a pattern persists, one of the most important elements in the Constitution and of the American form of government will likely be rendered moot from disuse. Precedent is not easily overturned, and powers once lost are not easily regained.

That is why it is essential that legislative leadership assert Congress's absolute right to decide whether to go to war. Failure to do so will be both an abdication of responsibility and a violation of the oath each took to uphold the Constitution. The practical consequence is this: If the leaders of Congress fail to assert congressional authority under the Constitution, the people will have lost the fundamental constitutional right to decide through their representatives whether to send their children to war.

Commanders in Chief have repeatedly failed to respect this constitutional mandate in the deliberations that led to the conflicts in Korea, Panama, Kosovo, and Iraq, among others. New military threats loom in Iran, and sadly, in this post-September 11 world, the risk of new armed conflicts is always near. We can be sure that our armed forces will be called to service again to face some new threat; we must ensure that the decision to send them is made by the people's elected representatives.

The courts also have a critical role to play. The judicial power includes jurisdiction to hear cases concerning whether the use of force abroad has been constitutionally authorized, whether the terms of the authorization have been violated, and the extent and nature of actions within the scope of the authorization. Should a court find that a war was not properly authorized, it could issue an injunction against continued military operations—as a federal district court did in *Holtzman v. Schlesinger*, when examining United States military actions in Cambodia.

The United States Supreme Court has exercised its jurisdiction to assess the scope of authority granted by the Authorization for Use of Military Force passed by Congress in 2001, in such cases as *Hamdi v. Rumsfeld* (2004), where it held that the authorization included the right to detain citizens captured on the battlefield. However, in most cases judicial review has been thwarted by invoking such legal propositions as the “political question” doctrine. Federal courts have the constitutional power to decide whether the use of force has been lawfully authorized. This question is justiciable and should not be confused with the political question of whether America should go to war.

Congress must clearly reassert the constitutional principle that only the people’s representatives have the authority to send American men and women to war, and courts should stand ready to assess whether these decisions have been lawfully made. Failure to do so may well result in a future president exercising what—by default—has come to be seen as the president’s unilateral authority. Retrieving lost power is a difficult thing in politics. In this case, it requires the courage of Congress to make the most difficult decision a government can make and to be accountable for it. If we are to preserve our system of checks and balances and prevent the unilateral declaration of future wars, Congress must do its duty.

Thank you for this opportunity to discuss such an important issue. I look forward to answering your questions.

Mr. DELAHUNT. Thank you very much, Mickey.
Steve Rademaker.

**STATEMENT OF STEPHEN G. RADEMAKER, ESQ., VICE
PRESIDENT, BGR INTERNATIONAL**

Mr. RADEMAKER. Thank you, Mr. Chairman, and Ranking Member Rohrabacher. I very much appreciate the invitation to appear before you today. It is a pleasure to be back at this committee where I spent almost 10 years of my professional life as minority chief counsel, and then later, chief counsel.

Prior to that, I served 4 years in the White House Counsel’s Office working for the first President Bush, and I worked on national security matters in that office. One of the matters I addressed in the White House Counsel’s Office was the War Powers Resolution, so I have spent nearly 15 years of my life as what you might call a practicing war powers lawyer.

I did many other things along the way, but I did work hands on with the War Powers Resolution from both ends of Pennsylvania Avenue. As a result of that experience, I have developed some views about the issue that is before you today, and I appreciate the opportunity to come share those views with you.

I also want to join my fellow panelists in commending you for holding this hearing because this is a critically important issue. I think it is about time that it receives the attention that you are trying to bring to it.

I have written a prepared statement, which you have. I will read two sections of it to you where I think I expressed myself better in writing than I can express myself extemporaneously, but otherwise, I will summarize what I said. The first part of my remarks essentially was an opportunity for me to tell some war stories, if you will, about experiences I had working with the War Powers Resolution.

I think those experiences illustrate some principles that are important for this discussion. The very first principle I point to is the one that you began your remarks with, which is that the War Powers Resolution and the larger issue of the allocation of war powers between Congress and the executive branch is not a partisan issue.

My own personal experience speaks to that. I spent most of my time on the committee staff working for Congressman Benjamin Gilman, Republican of New York, initially when he was ranking member and then when he became chairman. He was a very strong supporter of the War Powers Resolution. He voted for it in 1973 as a very junior member of the Congress and continued to stand by it his entire time in the Congress.

He was ultimately succeeded as chairman by Henry Hyde, who was not a supporter of the War Powers Resolution, but a man who, for strongly held principled reasons of his own, was an opponent of the War Powers Resolution. He tried to repeal it in 1995 and came very close to doing so. I point out in my remarks that had the vote taken place about 2 weeks earlier than it took place, he probably would have won.

That was certainly our judgment working on that in 1995. I think another interesting dimension that you, as a Democrat, in particular, Mr. Chairman, should pay attention to, is the issue of peacekeeping because I think there was a development during the 1990s that I think does potentially threaten the control that you and many other Members of Congress wish to see the Congress retain in the area of war powers.

What I observed during the 1990s was increasing frustration on the part of supporters of U.N. peacekeeping because, as you know, during the 1990s there were a number of U.N. peacekeeping operations that came along, and as it turned out, the ability of the United States, or I should say the President of the United States, to deploy U.S. Armed Forces into those peacekeeping operations was constrained by the War Powers Resolution.

During the 1990s among supporters of U.N. peacekeeping, this increasingly came to be seen as a problem.

I think looking longer term if you wish to conserve the authority of the Congress in this area you need to be attentive to the fact that there are forces at work who, for very good reasons, very principled reasons of their own, would have the Congress do things that I think ultimately would enhance the President's ability to introduce U.S. forces into combat situations overseas based not on a grant of authority from the Congress, but rather, based on a grant of authority from the United Nations.

I suppose the Congress could delegate its authority to the United Nations if it wanted to, but that would take this debate in a very different direction than it has gone in the past. One point, and here I will read, I want to make based on my experience is the following. This comes from my 10 years working here on these issues.

When a particular case arises under the War Powers Resolution, a particular country, a particular conflict, most Members of Congress are guided more by what they think about the military operation in question than by abstract legal principles.

In my experience, even Members of Congress who care passionately about the War Powers Resolution have sometimes been will-

ing to look the other way when a military operation came along that they supported but a majority of their colleagues did not. While this may sound like a criticism, I do not intend it as one.

To the contrary, I think this fact reminds us of a reality that is easily forgotten in discussions, like the one we are having today, divorced from the facts of any particular case. Debates over the use of military force involve questions of life and death.

Legal principles that sound good in the abstract become much less compelling in a discreet case where members firmly believe that the application or nonapplication of those principles may either cause or prevent unnecessary death or human suffering. I then in my remarks touch on some examples that I think illustrate what I am talking about.

Chairman Lee Hamilton, who was a very respected figure and a very strong supporter of the War Powers Resolution, was prepared in 1993 to look the other way when the Clinton administration came into violation of the War Powers Resolution in Somalia. He was chided for that fact by Congressman Gilman, for whom I worked.

I have attached to my statement an extension of remarks that Chairman Gilman submitted to the congressional record in August 1993 drawing attention to the fact that Chairman Hamilton was not asserting the authority of the Congress under the War Powers Resolution. It is a short extension of remarks.

I would draw it to your attention not just because it illustrates this point that I have just made but also because it explains one of the elaborate legal rationales that has been used by the executive branch to circumvent the language and I think the intention of the War Powers Resolution. Chairman Gilman did a good job dissecting the legal arguments being put forward by the Clinton administration at that time.

Six years later I was still working for Chairman Gilman, and he found himself in a very similar situation to Chairman Hamilton. President Clinton decided to undertake military operations in Kosova, and there was not majority support in the House of Representatives for that decision.

Chairman Gilman supported the decision, and like Chairman Hamilton before him, he decided not to confront the Clinton administration over it, not to stand on the principles of the War Powers Resolution, but instead, in essence, to remain silent. Then something very interesting happened.

Another Member of Congress came along who was not prepared to look the other way, a Member of Congress who defied the point that I just made that most members will focus more on whether they approve or disapprove of the operation.

Congressman Tom Campbell of California, a former Stanford Law Professor and a strong proponent of the War Powers Resolution, found a way under the War Powers Resolution to confront the Congress with the question of what, if anything, it was prepared to do about President Clinton's decision to undertake military operations in Kosova.

There are expedited procedures under the War Powers Resolution to both authorize or to order the President to terminate military operations that he has initiated. Congressman Campbell came

up with the idea of doing both, putting forward two separate resolutions, one to declare war and one to direct the President to terminate the operations in Kosova.

Because they were subject to expedited procedures, he was able to essentially circumvent this committee and circumvent the congressional leadership because I think it is fair to say that at that time the congressional leadership was not interested in confronting President Clinton over the Kosova operation either.

Congressman Campbell had expedited procedures, and so he forced a floor debate on his two measures plus two additional measures that were brought to the floor at the same time. I am very confident those other measures would not have made it to the floor but for Congressman Campbell's effort to force this debate using the expedited procedures of the War Powers Resolution.

He went to the floor and argued to the membership, you have to choose, either you are in favor of this or against it. If you are in favor, declare war, if you are opposed, vote to tell the President he has to stop.

It was a very sound argument, I thought it was a sound argument anyway, but what we saw was that both of his proposals were rejected and as was an additional proposal that had come over from the Senate that would have authorized continuation of air operations in Kosova but not authorized ground operations. On that measure, there was a tie vote.

There was a very clever quip by a White House spokesman at the time that what the House had just done was it had voted no on going forward, no on going back and tied on standing still. I mean, it was a very clever comment. I think it is reflective of the judgment at the time, which was that the House of Representatives had just embarrassed itself because it had shown its inability to reach a decision on a critically important question of national security.

What should be done? Here, I will read again from my statement. I believe the War Powers Resolution has succeeded in forcing Presidents to consult more closely with Congress than they otherwise would. It also has succeeded in forcing both branches of government to more carefully consider whether to authorize or seek to authorize particular deployments of U.S. Armed Forces.

The part of the resolution that has most visibly failed is the so-called 60-day clock. I have never approved of the 60-day clock. Because of the serious consequences that the resolution seeks to attach to expiration of the 60-day clock, all Presidents have had an incentive to either not report under the resolution on deployments of U.S. Armed Forces or to submit evasive reports.

The clock has also led the executive branch to adopt tortured legal interpretations that make a mockery of the law. Once such interpretation is spelled out in the extensive remarks regarding Somalia that I have attached to my statement. I believe the 60-day clock has had an even more insidious effect on Congress.

While the intention was to put teeth into Congress' assertion that the President cannot commit U.S. Armed Forces to combat without congressional authorization, in practice the affect has been to tell Congress that it need not do anything when a particular case arises. The message to Congress is that it does not need to act because the War Powers Resolution will act for it.

Not only is this bad policy, but it does not work, as we have seen on numerous occasions since 1973. The problem is not just that the executive branch has figured out clever ways to avoid the 60-day clock but also that in a surprising number of cases many Members of Congress have been satisfied for it not to work.

If Congress wishes to be a full partner in national decision making with respect to the use of force it does not need a default that can serve as an excuse for inaction. Rather, it needs procedural arrangements that will force it to act. I believe that Congressman Campbell was onto something 9 years ago when he tried to confront his colleagues with two options regarding Kosovo and argued that they had to pick one.

His message was that members should either authorize the operation or order the President to end it. The rules of that debate 9 years ago did not force members to choose, so both options were rejected and the House ended up looking foolish. I have great confidence in the ability of the Rules Committee to structure debates in ways that would force members to choose.

There is no procedural device the Rules Committee can construct by rule that Congress cannot write in to the law. I therefore suggest that Congress should consider replacing the 60-day clock with a requirement that Congress must vote when U.S. forces are deployed into hostilities. Congress could further specify that when it votes under these circumstances, an affirmative vote will be a vote to authorize and a negative vote will be a vote to order the withdrawal of U.S. forces.

Some might object that Congress should have before it more than just two options. There is no reason not to allow more options so long as the consequences of adoption of each option are made clear. If the option is adopted, will the President be allowed to go forward with the military operation or will he be required to end it?

I can see only two arguments against this kind of approach. The first is that it would deny Congress the option of equivocating on the use of force. The second is that there may be cases in which Congress is unable to enact legislation regarding a particular military operation. This could happen, for example, because the House and Senate disagree over whether to authorize or prohibit the particular operation.

It could also happen because Congress approved legislation forbidding a particular operation by less than a veto approved margin and the President went ahead on the strength of his veto pen. I think cases in which the President decided to proceed after Congress failed to override his veto would be rare and fraught with political danger for the President.

I acknowledge that Presidents may feel less politically constrained in cases where one House has voted to authorize an operation and the other has voted to forbid it. This risk does not exist in a vacuum, however. It must be compared to the risk that exists today of evasion by the executive branch of any sort of automatic clock that Congress might establish.

As we know from the uneven record of enforcement of the clock that exists today, that risk is considerable. Thank you.

[The prepared statement of Mr. Rademaker follows:]

PREPARED STATEMENT OF STEPHEN G. RADEMAKER, ESQ., VICE PRESIDENT, BGR
INTERNATIONAL

Mr. Chairman, Congressman Rohrabacher, Members of the Subcommittee, it is a great pleasure for me to appear before this Subcommittee to testify on the War Powers Resolution. The single most important component of the jurisdiction of the Committee on Foreign Affairs undoubtedly is its jurisdiction over questions of war and peace. Accordingly, I commend you for the efforts you are making to review how that jurisdiction has been exercised in the past and how it might be exercised more effectively in the future.

My perspective on the War Powers Resolution is shaped by the four years I spent as an Associate White House Counsel to President George H.W. Bush focusing on national security matters, followed by the ten years I spent as Minority Chief Counsel and then Chief Counsel to this Committee. I am, therefore, familiar with the legal arguments that both the Executive Branch and the Congress bring to bear on this debate, as well as the political constraints under which both branches operate when it comes to the use of military force. On the basis of this experience, I will make several observations at the outset.

THE WAR POWERS RESOLUTION IS NOT A PARTISAN ISSUE

Because of the history of the War Powers Resolution—its enactment over President Nixon's veto in the wake of the Vietnam War—the Resolution is commonly thought of as a partisan issue, something that Democrats generally support and Republicans generally oppose. This view has some foundation historically, but it is certainly misleading. For the majority of my time on the staff of this Committee, I worked for Congressman Benjamin Gilman, a Republican from New York. Congressman Gilman was a strong supporter of the War Powers Resolution. He voted for it in 1973, and he was committed to strengthening and preserving it as Ranking Member and later Chairman of this Committee.

In 1995, Congressman Henry Hyde, who was at that point Chairman of the Judiciary Committee, offered an amendment on the House floor to repeal the War Powers Resolution. Despite Republican control of the House, and despite support from such prominent Democrats as Congressman John Murtha, the Hyde amendment was defeated on a vote of 201–217. Chairman Gilman opposed the amendment, and he was reassured to hear from me prior to the vote that if the amendment passed the House, at least half of the likely House Republican conferees would oppose it in conference.

Congressman Hyde, of course, later became Chairman of this Committee, and as Chairman he continued to oppose the War Powers Resolution because he saw it as an unconstitutional infringement of the President's authority to deploy U.S. Armed Forces abroad in defense of vital U.S. interests. Chairman Hyde was, of course, an iconic figure to many Republicans, as was his counterpart in the Senate, Chairman Jesse Helms. Like Chairman Hyde, Chairman Helms was also opposed the War Powers Resolution, but for a completely different reason. Chairman Helms opposed the War Powers Resolution because he thought no President should deploy U.S. Armed Forces into combat without the express approval of Congress, and he viewed the "sixty-day clock" during which the War Powers Resolution permits such deployments as an unwise delegation of congressional authority.

During the 1990s, debates over U.S. involvement in peacekeeping operations became increasingly frequent and contentious in Congress. Some proponents of U.S. involvement in such operations—most often Democrats—grew increasingly uncomfortable with the constraints imposed by the War Powers Resolution on the ability of the United States to engage in peacekeeping. At the same time, some critics of U.S. involvement in such operations—most often Republicans—became more supportive of the Resolution. In the Senate, it was even proposed at one point to deem the requirements of the Resolution satisfied any time the United Nations Security Council authorized the use of armed force. Had this idea been adopted, Congress effectively would have ceded at least some part of its authority over the use of force to the United Nations.

THE WAR POWERS RESOLUTION IS A SEPARATION OF POWERS ISSUE

If the debate over the War Powers Resolution is not a partisan debate, it most emphatically is a debate between the two political branches of government. So far as I am aware, every President since Richard Nixon, Republican and Democrat, has decided that the War Powers Resolution is ill-conceived. When Congressman Hyde sought to repeal the Resolution in 1995, he was able to circulate separate signed letters from Gerald Ford, Jimmy Carter, and George H.W. Bush, all endorsing his

amendment. President Carter's letter stated "I fully support your effort to repeal the War Powers Resolution. Best wishes in this good work."

THE POLITICAL DIMENSION

When a particular case arises under the War Powers Resolution, most Members of Congress are guided more by what they think about the military operation in question than by abstract legal principles. In my experience, even Members of Congress who care passionately about the War Powers Resolution have sometimes been willing to look the other way when a military operation came along that they supported but a majority of their colleagues did not.

While this may sound like a criticism, I do not intend it as one. To the contrary, I think this fact reminds us of a reality that is easily forgotten in discussions like the one we are having today, divorced from the facts of any particular case. Debates over the use of military force involve questions of life and death. Legal principles that sound good in the abstract become much less compelling in a discrete case where Members firmly believe that the application or non-application of those principles may either cause or prevent unnecessary death and human suffering.

Chairman Lee Hamilton was a strong supporter of the Resolution, but in 1993 he chose to remain silent when the Clinton Administration came into noncompliance with the Resolution in Somalia. I am attaching to my statement a copy of an Extension of Remarks, entitled "Death of the War Powers Resolution in Somalia," that Ranking Member Gilman entered into the Congressional Record on August 4, 1993, chastising Chairman Hamilton for his silence.

Chairman Gilman was also a strong supporter of the Resolution, but six years later he faced a similar dilemma when President Clinton initiated military operations in Kosovo without congressional authorization. Like Chairman Hamilton, Chairman Gilman decided against seeking a confrontation with the Executive branch over a military operation that he supported. His rationale was very simple: he thought President Clinton's intervention in Kosovo was justified on humanitarian grounds, even if a majority of the House of Representatives did not, and he was not going to do anything as Chairman that might constrain the President's ability to save the lives of innocent civilians.

Just as supporters of the War Powers Resolution sometimes go silent when the Resolution risks interfering with a military operation that they favor, opposition to a particular military operation can turn critics of the Resolution into supporters. I mentioned that in 1995 I had to assure Chairman Gilman that there would be votes in conference to strip out Chairman Hyde's amendment to repeal the War Powers Resolution if that amendment passed the House. The reason Chairman Gilman needed this reassurance was because it seemed clear to us as we began the House debate on the underlying measure that the Hyde amendment was going to pass. Had Chairman Hyde offered his amendment before the Memorial Day recess in 1995, it likely would have passed. Chairman Hyde was afforded that opportunity, but he decided to hold his amendment until after the recess in order to allow more time to debate it.

During that two-week recess, press reports emerged that the Clinton Administration was preparing to deploy U.S. Armed Forces into Bosnia to conduct peacekeeping in that war-torn country. These reports changed the character of the floor debate on the Hyde amendment, turning it to some extent into a debate on the merits of a U.S. peacekeeping operation in Bosnia. At least one Member stated on the floor that he had previously supported repeal of the Resolution, but the prospect of a peacekeeping operation in Bosnia had changed his mind about the issue.

Of course, not all Members have been prepared to bend their views on the War Powers Resolution. I believe I am testifying in the company of two such former Members. Another such Member was Congressman Tom Campbell, a Republican from California who had previously been a law professor at Stanford University. He was sufficiently exercised by Congress's inaction in the face of President Clinton's initiation of combat in Kosovo that he took matters into his own hands. To circumvent this Committee and his own Leadership, he introduced two resolutions pursuant to the expedited procedures of the War Powers Resolution. His first resolution directed the President to withdraw U.S. forces from Kosovo, and the second declared war on Yugoslavia. The expedited procedures of the War Powers Resolution afforded him floor votes on both measures. He argued on the floor that Members logically had to vote in favor of one of the two options he was presenting. In the end, two other options were presented as well, including a Senate-passed measure that would have authorized continuation of the air campaign—but not a ground war—against Yugoslavia.

Both options presented by Congressman Campbell were defeated. His concurrent resolution directing the President to remove U.S. Armed Forces from the conflict was defeated on a vote of 139–290. His joint resolution declaring war was defeated 2–427. The Senate-passed measure also failed on a tie vote. At the time, this entire exercise was seen as an embarrassment to the House of Representatives. One White House spokesman quipped that the House had “voted no on going forward, no on going back, and . . . tied on standing still.” My own view, however, was that the House had tried to fulfill its responsibilities and had thoroughly debated an important issue. The problem was that the debate took place under defective procedures that did not guarantee a clear outcome.

I do not mean to suggest with these examples that Members of Congress are the only ones to take a result-oriented approach to the War Powers Resolution. Presidents do so as well. In my experience, once a President becomes determined to use military force, he typically is interested in seeking congressional authorization for that use of force only to the degree he is satisfied that he will win. I believe this accounts for the willingness of President George H.W. Bush to seek authorization for the first Persian Gulf War, and the willingness of President George W. Bush to seek authorization for the response to 9/11 and the second Persian Gulf War.

The other extreme is illustrated by Somalia. In that case, neither the first Bush Administration nor the Clinton Administration requested authorization to deploy peacekeeping forces to Somalia. The Senate nevertheless voted to provide it, and after some hesitation the House voted to provide authorization for a period of twelve months. The Clinton Administration concluded that all it was likely to get if this issue went to a conference committee was authorization for twelve months. It decided that this would be worse than no authorization at all, and so it asked the Leadership of both houses to drop the matter. Presumably the Clinton Administration regretted this decision some months later after 18 U.S. Rangers died in the Blackhawk Down incident and political support for peacekeeping in Somalia collapsed, but by then it was too late for it to build a policy that Congress would support.

WHAT SHOULD BE DONE?

I believe the War Powers Resolution has succeeded in forcing Presidents to consult more closely with Congress than they otherwise would. It also has succeeded in forcing both branches of government to more carefully consider whether to authorize or seek to authorize particular deployments of U.S. Armed Forces. The part of the Resolution that has most visibly failed is the so-called “sixty-day clock.”

I have never approved of the sixty-day clock. Because of the serious consequences that the Resolution seeks to attach to expiration of the sixty-day clock, all Presidents have had an incentive to either not report under the Resolution on deployments of U.S. Armed Forces, or to submit evasive reports. The clock has also led the Executive branch to adopt tortured legal interpretations that make a mockery of the law. One such interpretation is spelled out in the Extension of Remarks regarding Somalia that I have attached to my statement.

I believe the sixty-day clock has had an even more insidious effect on Congress. While the intention was to put teeth into Congress’ assertion that the President cannot commit U.S. Armed Forces to combat without congressional authorization, in practice the effect has been to tell Congress that it need not do anything when a particular case arises. The message to Congress is that it does not need to act, because the War Powers Resolution will act for it. Not only is this bad policy, but it does not work, as we have seen on numerous occasions since 1973. The problem is not just that the Executive branch has figured out clever ways to avoid the sixty-day clock, but also that in a surprising number of cases many Members of Congress have been satisfied for it not to work.

If Congress wishes to be a full partner in national decision-making with respect to the use of force, it does not need a default that can serve as an excuse for inaction. Rather, it needs procedural arrangements that will force it to act. I believe that Congressman Campbell was onto something nine years ago when he tried to confront his colleagues with two options regarding Kosovo, and argued that they had to pick one. His message was that Members should either authorize the operation, or order the President to end it. The rules of that debate nine years ago did not force Members to choose, so both options were rejected and the House ended up looking foolish. But I have great confidence in the ability of the Rules Committee to structure debates in ways that would force Members to choose. And there is no procedural device the Rules Committee can construct by Rule that Congress cannot write into the law.

I therefore suggest that Congress should consider replacing the sixty-day clock with a requirement that Congress must vote when U.S. forces are deployed into hostilities. Congress could further specify that when it votes under these circumstances, an affirmative vote will be a vote to authorize and a negative vote will be a vote to order the withdrawal of U.S. forces. Some might object that Congress should have before it more options than just these two. There is no reason not to allow more options, so long as the consequence of adoption of each option is made clear. If the option is adopted, will the President be allowed to go forward with the military operation, or will he be required to end it?

I see only two arguments against this kind of approach. The first is that it would deny Congress the option of equivocating on the use of force. The second is that there may be cases in which Congress is unable to enact legislation regarding a particular military operation. This could happen, for example, because the House and Senate disagreed over whether to authorize or prohibit a particular operation. It could also happen because Congress approved legislation forbidding a particular operation by less than a veto-proof margin, and the President went ahead on the strength of his veto pen.

I think cases in which the President decided to proceed after Congress failed to override his veto would be rare and fraught with political danger for any President. I acknowledge that Presidents may feel less politically constrained in cases where one House has voted to authorize an operation and the other has voted to forbid it. This risk does not exist in a vacuum, however. It must be compared to the risk that exists today of evasion by the Executive branch of any sort of automatic clock that Congress might establish. As we know from the uneven record of enforcement of the clock that exists today, that risk is considerable.

Thank you, Mr. Chairman.

Mr. DELAHUNT. Well, thank you very much, Steve. Again, let me just note that this is a beginning. I think this is a debate that I would hope over time that the nation would become engaged because, as I indicated in my remarks and I think all of you in your own way have indicated your concurrence, now is the time. I think we have a confluence of realities, and we have an opportunity.

I know it is an extremely difficult task, but the work that you have done, the work that is currently underway at the Miller Center under the leadership of former Secretaries of State James Baker and Warren Christopher indicates that there is a possible intersection of interest, a recognition of the need to review war powers and try to unravel, if you will, the mess that we are in because, Mickey, I think you are correct.

We can blame Presidents easily, but it is true, as I referenced in my own remarks, that we don't have an option. The Founding Fathers did not give us an option. You used the word burdens, which I think is probably a better word than the one that I utilized which was responsibility. We don't have a choice.

It is a question as to whether we are going to meet our responsibility, and therefore, how shall I phrase it, reemphasize or accentuate what the intent of the Founders were when they crafted this very delicate document with, at its core, the concept of checks and balances and separation of powers.

We are doing a disservice to our Constitution by not taking this responsibility, taking this burden, and honoring our own oaths of office. I am going to save my questions for the end. I am going to go to the ranking member first, and then I will go to Mr. Carnahan. We are also joined by an individual whom I am sure you recognize, the delegate, Mr. Faleomavaega. Welcome, Eni.

I just want to make one observation about your concern or your observation, rather, about the United Nations. I think that we have dealt with that. This subcommittee has jurisdiction over inter-

national organizations, and clearly, the U.N. being the one that emerges as that with the highest profile.

I don't think that there is a single American military personnel anywhere out of about 100,000 peacekeepers that is involved in any combat at all. If that were the case, I would concur with the concerns that you expressed.

Dana.

Mr. ROHRBACHER. Well, thank you very much. I have appreciated all of your comments. I, too, worked at the White House, as well as in Congress. I have seen the decisions that are made, both in the executive branch and decision making in the legislative branch, as well, when it comes to military action. I personally know the magnitude of the decisions that we are talking about.

I will just give you one little story to preface my questions with to show you that I do understand the magnitude of what we are talking about. I of course worked in the Reagan White House during the 1980s, and I will not forget when we introduced troops into Lebanon, when we introduced the Marines into Lebanon.

I was in the White House at the time, and I took that very personally because my father was a former Marine officer. We were raised, in fact, I was raised at Camp Lejeune, Cherry Point. My brother's very best friend, Sergeant David Battle, who had graduated from high school, was still in the Marine Corps when Ronald Reagan was inaugurated.

My family went down, and we had dinner with the Sergeant, and his wife and his family, his mother and father, who had been close friends of our family for a long time. So I went back up, Reagan was inaugurated, I became part of the President's staff, and then we sent the Marines into Lebanon.

I remember running around the White House and asking everybody, saying, "What are we doing here, you know? This is not 1957, these Marines are totally outnumbered, this is a ridiculous deployment and what are we doing here?"

There was an explanation, by the way, that, frankly, the explanation I was given by the National Security Council people was that there had been some agreement with Israel that if we would keep our Marines in Lebanon that Jordan then would agree to negotiate with Israel, and this could be the first step toward this long thing where we would end up with peace between Israel and Jordan and what a great step forward that would be.

That was what was being explained to us was the strategy behind putting the Marines in Lebanon. My answer was the chances of all of that happening are about one in 10 at best, the chances of this turning into a fiasco are about one in two, so the odds are really against you, this is insane.

Then I understand that at some point the State Department decided that the Marines shouldn't have clips in their rifles, should not have bullets in their guns because the Marines might be trigger happy and get into a shooting situation where civilians would be killed, and it would undermine our political efforts there, blah, blah, blah.

So no Marines were going to be able to have bullets, and we sent them to Lebanon with that prerequisite, if you can imagine, which I again thought was insane, and went back and started arguing

about it with our—and I was told the same thing, by the way, interestingly enough.

“Don’t worry about it, Dana, Jim Baker is a former Marine, you know, all these different people, Caspar Weinberger was a Marine, these people were Marines, and they are not going to let anything stupid order like that, sending the Marines in, they will not let it stand.” I just took it for granted that would be corrected.

You know, Bud McFarlane was a Marine; he was the National Security Advisor at the time, so I took it for granted that it would be fixed. It wasn’t fixed because what happened is that issue was on their desk, and another issue got put on top of it, and top. Finally, that was at the bottom of the stack, and they had forgotten about it.

Then the first remnants of Al Qaeda drove a truck into the Marine barracks and blew up 240 Marines, and Sergeant Battle was the number one name on the list of the casualties. I went to my office, and I cried because I had kept my mouth shut and had not been exercising the influence I could have had to at the very least made sure that they had bullets in their guns.

I pledged to myself at that moment that I would never hesitate to be a royal pain in the ass to people who are advocating policies that I thought were wrong for the country and did not take into consideration the value of these people that defend our country. That is why I have been so outspoken as a Member of Congress.

I made that pledge. I went down, and I helped dedicate the wall to those men, those brave Marines. With that said, I am just going to say this. We have the authority in Congress; Congress just isn’t exercising its authority. We can blame the system isn’t set up right, and if you disagree with this war—and I think the President’s made major mistakes in implementing it.

Just, by the way, I voted against eliminating the War Powers Act. For some reason, the Republicans decided that they were going to eliminate the War Powers Act. I voted against that motion. When we were the majority I actually supported Tom Campbell’s efforts to make sure that the War Powers Act was being enforced during the operations in Bosnia.

If people don’t have the courage to use the authority they have already given them, making the system, you know, expanding the system and expanding more authority, just rearranging it, that is not going to do any good because unless people have the guts enough to make a pain of themselves and to actually exercise their authority, it doesn’t make any difference.

I happen to believe that Congress has the full authority right now, if it chooses, to end this war in Iraq. I happen to not agree that we should be ending the war in Iraq precipitously. I happen to think that it might have longer term consequences that would be very damaging for our country. That has taken a lot of soul searching because I also recognize all of the mistakes that we have made.

I might add, when I opposed military force in Kosova, I am a big supporter of Kosovian independence, but it doesn’t require us always to bring in American military forces. My strategy has always been let us support local people who are struggling for their own

freedom rather than have American soldiers going in and doing the fighting for them.

That is why I was such a big supporter of the war against Soviet expansionism in Afghanistan, and, I might add, I also supported the Contras in Nicaragua because we were not sending our military forces in, we were letting people, giving them the means to achieve it themselves. Just back to this, and I will just give this to the panel, I mean, we have a certain degree obviously here in Congress where people don't want to make a pain of themselves.

For political reasons, they don't want to stand out, and we have political bickering here that has polarized our Congress. Why giving them more authority is going to make any difference? Why can't we just cut off the funds? If the President has committed troops somewhere, don't we have the power now to say in an appropriations bill, just say there will be no more funds for this operation?

Don't we have that power? So why do we need to change the system if we have that power already? Go for it.

Mr. SKAGGS. If I may, Mr. Chairman. I don't want to contradict Mr. Rohrabacher's characterization of the powers that remain in this place to end a conflict. What I am concerned about is the beginning, and what is problematic I think is the lack of any ready tools for the membership, I won't use your vernacular, Mr. Rohrabacher, but who wish to force the issue, the absence of really any tools in advance of conflict.

You know, the problem that we have all faced is how difficult once forces have been committed to extract them without also compromising the stature of the United States and our credibility. It is the beginning phase that is I think one that demands additional tools to make sure that things are not started that shouldn't have been started, not, as you point, that we don't have the tools to end them if they were mistakenly done.

Mr. ROHRABACHER. Well, we have heard the 60-day requirement. Isn't 60 days enough, if we have Congress has to act within 60 days?

Mr. SKAGGS. Let me also tell a story, if I may, Mr. Chairman, and I am reminded of it by the portrait of Leon Panetta that is over there in the corner. When Mr. Panetta had gone over to the other side and was Chief of Staff to President Clinton at a time before we were about to invade Haiti, Mike Synar, a dear departed colleague, and I were trying to get this place to do the right thing in advance of Haiti when it looked as though it was to be an invasion, not a peacekeeping operation.

We went down to see Leon and said, "Leon, you know, you are one of us, don't you think we ought to have a vote on this before we take military action under the circumstances that we are facing, you know, the War Powers does not have an exception for small, Latin American countries."

You know, I think Leon, I don't recall anything that I can quote, I would like to think that he felt somewhat uncomfortable but asserted as those in the White House want to do that, no, you know, this is simply a little police action kind of thing, and it really doesn't implicate War Powers.

Because there was really no mechanism for me and Mike Synar to force the issue among our reluctant colleagues here against a President of our party at the time we had all but filed suit when, as you will recall, on the, I forget whether it was the 101st Airborne, but anyway our paratroop forces were in the air to go down there, and the Haitian authorities finally agreed to let them come in, so it was not any longer an invasion and not any longer a combat operation.

It is that circumstance which we have faced over and over again and will again face that I think cries out for some procedural mechanism so that the rank and file members here can force this issue——

Mr. ROHRABACHER. Okay. So you believe that before the President can send in an airborne unit into another country that Congress would have to vote?

Mr. SKAGGS. Depends on the circumstances. There, it was clearly up until the very last minute going to be a combat operation in which we were invading a sovereign country. Under those circumstances, when we have not been attacked, when we are proposing to go from the get go into a combat environment, you bet. That is what Article I, Section 8, Clause 11 contemplates, in my view.

Mr. DELAHUNT. If the gentleman would yield?

Mr. ROHRABACHER. Certainly.

Mr. DELAHUNT. I don't mean to misrepresent you, but what you are saying is that is our responsibility.

Mr. SKAGGS. You bet.

Mr. DELAHUNT. If we respect this Constitution, if we take that oath, as Mickey Edwards indicated, we don't have the choice. It is the Constitution that tells us. Mr. Rademaker, do you agree with that?

Mr. RADEMAKER. I think the Congress has extraordinary authorities in this area. I think what we have seen is Congress has not exercised those authorities, and I guess I would submit to you that is, in fact, a decision.

Mr. DELAHUNT. Let me interrupt, if I may, on your time. Do you believe, do you agree with Congressman Edwards when he says it is not the authority, it is the responsibility? It is the responsibility that in my opinion is enumerated, you know, in Article I. How do we avoid that responsibility? Congressman Edwards uses the term burden.

Do we just ignore the Constitution? Do we, as he suggests, acquiesce and demonstrate no courage? I mean, isn't that the essence of what we are really talking about? Do we say to the legacy of George Washington, and Jefferson, and Adams and those that drafted the Constitution, we are lesser?

Mr. RADEMAKER. Again, I think the Congress has the authority. A decision not to exercise the authority or to look the other way when another branch of government acts in a way that people like yourself think are contrary to Congress' authority, that is a decision. That is a decision by the Congress.

Mr. ROHRABACHER. Reclaiming my time. Could we right now if, for example, we do not want to support a military, could we pass an emergency appropriations bill immediately denying any funds to

that military operation? Do we have that power now? Whoever wants to answer is fine.

Mr. SKAGGS. Well, I would be glad to stick my nose out again. I believe it was for the fiscal year 1999 Defense appropriations bill the House passed an amendment that I drafted that provided that none of the funds appropriated in that bill might be used in violation of Article I, Section 8, Clause 11.

In other words, conditioning Defense appropriations generically on compliance with the War Powers provision. There may be other ways to sort of anticipate the issue. That provision was rejected by the Senate and wasn't restored——

Mr. ROHRABACHER. Basically, Congress didn't exercise its authority on the Senate side, but don't we have the power now, right now?

Mr. FALEOMAVEGA. Would the gentleman yield?

Mr. ROHRABACHER. Hold on 1 second. I really need to answer this specifically. Can we pass a bill right now if Congress said we want to just tomorrow get all the troops out of Iraq that we would say there will be no funds being used in Iraq for military purposes except to bring our people out immediately from Iraq? Can we do that?

Mr. RADEMAKER. Absolutely. The Constitution is clear. You know the process as well as I. Both Houses would have to approve it, it would have to go to the President and he would have to sign or veto. If he vetoed, then two-thirds majorities of both Houses would be required, but assuming that is there, then the provision is enacted into law.

Mr. ROHRABACHER. Okay. Getting back to the beginning, we had a military operation early in our country's history in which the Founding Fathers who actually wrote the Constitution were making decisions as to that military action. It was when President Jefferson sent a fleet to attack Tripoli which was then conducting pirate raids, basically terrorism, against American military vessels in the Mediterranean.

Do we know whether or not Congress at that time authorized that military action? Did Jefferson feel compelled to have congressional authorization before the action? I don't know. I am asking the question.

Mr. EDWARDS. First, let me say that despite my advanced age I don't recall being there at the moment to know.

Mr. ROHRABACHER. It is significant because I believe, was Madison Thomas Jefferson's Secretary of State? The author of the Constitution was Jefferson's Secretary of State, I believe.

I should have prepared for this a little better, but it would be I think important for us to know whether or not Thomas Jefferson felt compelled and James Madison, the author of the Constitution, felt compelled before ordering the fleet to attack Tripoli to ask for congressional approval or not. So I need to know that, if we can get the answer to that some way.

Also, by the way, let me note that military operation turned into a total fiasco. I mean, we had built these huge war ships, we only had five of these ships in our whole Navy, and we sailed the biggest and best one right onto a sand bar in the Tripoli Harbor. It was called the Philadelphia.

Steven Decatur got his name, his fame, not for destroying the enemy ships but by going over and destroying our own ship so the enemy couldn't get a hold of it. It was a total fiasco, and 400 sailors were taken prisoner and held hostage by the Sultan.

I might add, the thing that eventually worked was we sent the Ollie North of his day, William Eaton, into the interior of Libya, into the Tripolian area there, and they mustered a guerilla army around an alternative to the ruler of Tripoli and put pressure on that way, by supporting local people in their struggle. The use of military, you know, just direct military force, didn't work in that case. So just a historical background.

I would hope, Mr. Chairman, by the time we have our next hearing that we will look at the legal prerogatives that Madison and Jefferson felt were necessary for that first military operation that we had.

Mr. EDWARDS. Can I just make one comment about the question you asked to Dave? The Congress certainly has the power constitutionally to cut off funds, but I completely agree with what Dave said that the real issue is about authorizing military action in the first place because the reality is if you did what you just now said, which is tomorrow you say there are no more funds to do anything except to bring the troops home immediately, what happens is you have Marines, you have soldiers who are there who are targets, who could be denied ammunition resupplies, equipment resupplies, while they are targets.

That is the problem with your original War Powers Act. The 60-day provision allows a President to create a fait accompli where you are put in a box, you know, that if you try now to exercise your congressional authority, you are putting our troops at risk. That is why the decision has to be made in the beginning.

Mr. ROHRABACHER. You know, I have got to tell you something. Those are decisions that people have to make, and, you know, when the President or people decide to send troops in they know they are going to put people at risk and it better be taken very seriously, those decisions, and the decision to pull somebody out is also an important decision.

Let me note that after the Marines were blown up in Beirut it took Ronald Reagan a very short time to get those Marines out of there. We just said, okay, this was a bad decision to begin with, and we are just going to pull them out. Frankly, that was the right decision on the part of President Reagan.

So, yes, there are consequences to decisions. Unfortunately, I think that it is important for us to be able to stand up on either end of the decision. With that said, Mr. Chairman, thank you very much, again. This is a very interesting hearing.

Mr. DELAHUNT. Thank you, Mr. Rohrabacher. I will go next to Congressman Faleomavaega, but before I do, if you will indulge me for a moment, Eni.

I think clearly in this moment with Iraq and Afghanistan front and center I don't think there is any disagreement that we have the authority to end, but the issue, I think as both Mr. Edwards and Mr. Skaggs have indicated, is the initiation of hostilities that the War Powers Resolution addresses because the reality is that once you are there it is difficult to extricate.

Now, what I think we are trying to foresee is into the future a War Powers Resolution that recaptures to the Congress its constitutional responsibility so that we can't walk away from it and that we have to address it because, as you indicated in your description of what occurred in your personal experience, every voice is needed to be heard, and it can't just simply be the voice of one.

You know my position on Iraq. I voted against the authorization. Please. I voted against that authorization. The reality is and the truth is that this President did secure the authorization. I am not denying that. What I suggest is that what we need to reflect on and think about is what is going to happen the next time? What is going to happen the next time? Eni.

Mr. FALEOMAVEGA. Thank you, Mr. Chairman. I want to thank you for allowing me to participate in our hearing this morning even though I am not officially a member of the subcommittee, but I felt it very important that I should come and listen to our distinguished members of the panel, and especially Mr. Skaggs, whom I have had the privilege of knowing for years, and Mr. Edwards, as well, as an admirer of him from a distance, and Mr. Rademaker, as a former counsel also, to Chairman Gilman.

Most eloquent statements. Mr. Chairman, I think not only is it most appropriate that you called the hearing to examine this very important issue. One area that I just wanted to respond to, my good friend, Mr. Rohrabacher's statement earlier about whether or not Congress has the authority to do this.

There is another provision in the Constitution, if my memory serves me right, not only the War Powers, Congress has the exclusive power to raise the Army and the Navy, not the President. I think this is where we can really put strictures or whatever requirements because it is an exclusive authority given to the Congress under the Constitution. Not just a war wower clause but also the right to raise an army and a navy.

By doing that, we have the power of the purse. This is like saying the King has no clothes, if there is no acceptance of whatever proposal the President may bring before the Congress for consideration. So I just wanted to note that to my good friend, Dana, that there is absolute authority of these two areas.

Not just the war powers, but the power to raise an army and a navy is not given to the President, it is given to the Congress. I don't think there is any disagreement of what has been said. I just want to note what Mr. Edwards had said earlier.

I think it is a stroke of genius on the part of the Founding Fathers how they drafted the Constitution and the fact that our country was founded in blood, the lives of many of the people who struggled, and if we read the Declaration of Independence, the signers of the Declaration pledging their fortunes, and their lives and everything there was that they had in their possession physically all ultimately to fight against King George and the way that these colonists were being treated by the monarchy.

I think what it bears out to suggest here, Mr. Chairman, and for what Mr. Edwards, Mr. Skaggs and Rademaker have said, there is absolutely no question as far as the constitutional right given to the Congress to not only declare war but also to raise an army, and a navy and whatever the necessities that run with it.

Of course we had no Air Force at the time, but we all understand it is all part of the military apparatus that we now have. I was very moved by Mr. Rohrabacher's earlier statement, his own personal experience, his father being a former Marine. I have several of my relatives who were Marines.

In fact, I recall my uncle, who served two tours in Vietnam, and he complained to me that one of the most stupid policies that they had as a Marine, they can shoot at you, but you can't shoot back. That was the kind of policies that we had in Vietnam. Just as an example of how things have become so fouled up in a way.

I say this in my own personal experience through my good friend, Dana, and we have shared these experiences before, I served in Vietnam in 1967, 1968, so I think I have a little sense of appreciation when it comes to saying I was just a grunt. I was among the half a million soldiers that were sent to Vietnam, and in every day and every moment of my life I didn't know if I was going to come back in a body bag or come back alive.

The question of war I wish to God that whenever the issue of war comes up before the Congress and before the administration it should never, never be a partisan issue. It should never be classified or how the media, also, I think does tremendous disservice and injustice to the American public of putting labels and saying that this is a Republican or a Democratic issue.

I don't think there was any question at the turn of the country when the imperial Japanese force in 1941 attacked us. There was no question on how unified our country was when President Roosevelt personally in joint session of the Congress making a plea to the Congress at his time that we need to declare official war because we were attacked.

It was on the question of defending our own freedoms and our own situation. Things get a little murky and a little ambiguous when we go back to the very question that we were discussion earlier about the 60-day time period. That is where things become a little fuzzy. You have to give a sense of appreciation to the President.

You have got a \$500 billion operation across the Potomac River in trying to manage and to do some kind of, bring some kind of order and management on how we operate and administer the affairs of our military. That is where really the problem comes into play. I want to commend my good friend, Mr. Jones, for introducing the joint resolution, and please put me as a co-sponsor.

We need to discuss this more actively. I know the bell is ringing. I want to commend all my good friends for the beautiful, their eloquent statements. Mr. Chairman, I want to thank you for allowing me to say my piece.

Mr. DELAHUNT. Thank you, Eni. As I have stated I think before your arrival, it is my intention to have a series of hearings. This is an issue that needs a lot of attention, and I am sure hopefully will provoke debate and public discourse. It is not about Iraq, it is about the future with the lessons to be learned from both Tripoli and Iraq.

For the record, I have to compliment my own staff in response to Mr. Rohrabacher's question relative to Jefferson. He did ask for

the authority in December of 1801, and in February 1802, Congress acted appropriately and authorized the use of force.

Mr. ROHRABACHER. That was prior to the ships sailing.

Mr. DELAHUNT. I hope it was prior to the ships. Maybe they were on their way. If I could just take a few moments. I, too, have cosponsored the legislation, the Jones Act, if you will, the latter day Jones Act. I would ask you for just a very brief observation in terms of how it can be improved.

We have had the discussion. This is certainly not etched in stone. I would ask the three of you to at the conclusion of the hearing, or rather, during the course of the next several weeks if you would be so kind as to give us some guidance, both orally, as well as in writing, as to how the legislation can be improved. It would be most welcome.

I would ask you, at an initial review, how could we improve that? Secondly, in a proposal that was put forth by the former chair, Lee Hamilton, he suggested a mechanism for continuing ongoing consultation between Congress and the White House. I think now more than ever given the reality of American power and the call on American power frequently, what kind of mechanism could you envision?

A bipartisan committee, if you will, that would have frequent and regular meetings with the President regarding issues that clearly portended the possibility of military action? I just put that out for your observations, if you have any. We have got about 2 or 3 minutes to go, so if you could each take a minute.

Dave, why don't we start with you?

Mr. SKAGGS. Well, thank you, Mr. Chairman. I made comments in my prepared statement about Mr. Jones' legislation, so I won't repeat those here. I did want to point out to Mr. Rohrabacher that the Tripoli expedition was the occasion for Marine Lieutenant Presley O'Bannon to capture a Marmaluke Sword that became the standard sword configuration for Marine officers to this day.

Mr. EDWARDS. Let me just say that I will think about this. I very much appreciate the opportunity to get back to you with additional thoughts. My initial reaction all along is that the War Powers Act in itself, having the War Powers Act is not only contradictory to the Constitution, but, in fact, has gone a long way toward giving the President a feeling that he had leeway that he should not have been given.

So I have to think carefully about whether or not the War Powers Act, you know, should be amended, revised or eliminated.

Mr. DELAHUNT. Steve, I know that you in your written testimony have made some suggestions that I found interesting. Any further comment?

Mr. RADEMAKER. To apply my suggestions to the Jones resolution I would say by my reading of the gentleman's resolution, I would call it a strengthened version of the War Powers Resolution that attempts to put teeth in the War Powers Resolution by linking the order to the President or the requirement of the President to withdraw forces to the appropriations power, which would be a stronger linkage than exists today, but you saw in my testimony that my principal criticism of the existing War Powers Resolution is the 60-day clock.

By my reading, what this resolution does is it substitutes for the 60-day clock, a 30-day clock, and for all the reasons that the 60-day clock has not worked, I don't really believe a 30-day clock will work any better. So I guess, based on my experience working in this area, I would not be especially optimistic that if enacted this resolution would fundamentally change the problem that we have been talking about this morning.

Mr. DELAHUNT. Mickey?

Mr. EDWARDS. If I could make just one more quick comment. If you embrace the idea of constant consultation it is important that the Congress, not the President, determine what Members of Congress and congressional staff are entitled to access to information.

Mr. DELAHUNT. Well, thank you. Thank you so much for your testimony, your presence, and be assured that we will be reaching out for you. As I said, I am sure this is going to be a long and arduous task, and we are going to need people like yourselves to assist us in that journey. We will suspend, and when we come back we will hear from our honored guest, Mr. Jones.

[Recess.]

Mr. DELAHUNT. Well, we are with our second panel, a gentleman who has received many kudos and justifiable comments from both the ranking member and myself and others. You are clearly to be commended for bringing this important issue to our attention.

We hope to hear from you and learn how you became seized with this issue and the primary ways in which this legislation differs from the current War Powers Resolution. We obviously are not marking your proposal up or even debating its finer points, but as I indicated earlier, I think what you have done, Congressman Jones, is launch a healthy public discourse about an issue that I think we all concur is of profound consequence to our country.

Walter, if you could proceed.

STATEMENT OF THE HONORABLE WALTER B. JONES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. JONES. Mr. Chairman, I want to thank you and Mr. Rohrabacher for your kind words previously. I am a man who loves Jesus Christ with all my heart and soul, and accept it in a very humble way because my Savior was humble. I thank you very much for those comments. I am going to be brief, but I want to explain I have been on the Armed Services Committee for 14 years.

I don't blame anybody for what I didn't do, but when we had access to the intelligence estimate on Iraq, I did not go read the estimate. I regretted that probably more a year after the fact than before we voted on the resolution. As you know, and this does lend itself to why I am here today before you and Mr. Rohrabacher, 2 weeks after we went into Iraq I attended Michael Bitz's funeral.

He was a Marine killed, and his wife, Janina, read the last letter she received from him. I am sitting there with the family outside at Camp Lejeune, it is a beautiful day, kind of like today is, and she reads word for word his letter. I had taken those thoughts that she shared with us, which was very emotional for her, it became very emotional for us, and on the way back to my home about 72

miles away I asked God, what was I supposed to take back from this?

Not being a person who served in war I don't know how bad war might be. I have no idea as an individual. I felt the hurt and the pain of the children and the wife because the husband and the daddy was not coming back home. He had actually written a letter she read the day before he was killed.

He talked about his love of his Lord, he talked about his desire to get back to the wife that he had always been true to and he talked about wanting to see the twins that he had not seen. They were born 3 weeks after he was deployed. When I got back, I made a decision that because I did not do my responsibility, I would write every family in America that has lost a loved one.

Of course that includes extended families, also includes people killed in Afghanistan, where I really felt this country should have been. We have sent over 7,400 letters in 4 years. I sign them every weekend. There are fewer now than there were. Let me make that clear. Of course we had 12 killed this week in Iraq.

That is the way that I have come to a conclusion that not only did I not meet my responsibility but neither did the Congress. That first panel could articulate better than I, and you two gentlemen in your comments and your questions better than I, but I do have a love and appreciation for the Bible and the Constitution.

I did not meet my constitutional responsibility, but yet, the Congress, in its way of giving the President the authority, in my opinion—and this is not about Iraq and it is not about Afghanistan, but I have got to tell you why I am here—we did pass a resolution, which I voted for, you didn't, as you said, and I appreciate that; but the fact was that I did not feel I went to every hearing that we had, I didn't ask the questions that I would ask today.

If we were having hearings about going into Iran or some other country I would be more vocal in those classified settings. I would ask questions I did not ask. So the fact is that there is something wrong and has been wrong since 1973. I wish that this committee would come forward with a bill to repeal the War Powers Act of 1973.

If you did, I would support it. I would love to have a few minutes to speak on that repeal. As was said by the first panel, that is probably not going to happen.

Because it is probably not going to happen, if we have got a system that the Congress looks to to help it make decisions about this country going into war and that system can be strengthened to improve and to better partnership the Congress in meeting its responsibility the President, the Commander in Chief, then I think that the present system needs to be fixed. I do not think that this is the answer.

I want to give credit, I want Mr. Rohrabacher to know this and you to know this, Mr. Chairman, that 8 months ago we started this process—my staffer who is here today, John Thomas, is an attorney—that we reached out to the Constitution Project. You heard from a couple of their people today, former Congressmen Skaggs and Edwards.

We also reached out to Professor Peter Raven-Hansen at George Washington University who has been someone of an expert on this issue of War Powers.

So I said to John, I want to come forward with a bill that will get a committee interested in the issue because I have learned one thing from being here 14 years and 10 years in the North Carolina legislature, and this is the way it should be, once a bill is worthy to get before a committee, and if there is going to be any movement, that bill becomes the committee's bill, and that is the way it should be.

I don't want any credit. You all have been overly gracious. I don't want any credit for this at all. I want none. All I want to see is that one day there would be legislation that would give more consultation and give Congress more authority to be in discussions with the President.

As Mr. Skaggs said, probably the most important period of time is before you go into war, but at times even after that what I have seen here, and maybe because I am not in the leadership you might tell me, no, Walter, you are wrong on this, but I feel like we have just been on the outside watching the game be played.

We pass all these supplemental bills. Mr. Rohrabacher, you made mention of this earlier. We pass all these, you know, and then if you don't vote for them you don't want to support the troops. It is just that kind of issue that has brought me to this point. There are four major points that I could read to you very quickly, and I think I should just so I won't misstate anything, that I think speaks to the issue of the 60 days versus the 30.

We say 30 days. I do think, Mr. Chairman, you were right to ask these experts to submit recommendations as this process moves forward. Let me go first to, really, there are four major changes in the bill. The first, the Constitutional War Powers Resolution, which is H.R.J. 53, distinguishes between where congressional approval is required and where it is not.

The War Powers Resolution of 1973, the President could act in any instance without prior congressional approval. That is the important part: Without prior congressional approval.

Under H.J. Resolution 53, the President may authorize the use of our Armed Forces prior to congressional approval only, and the word is only, if one of the following events occurred, and I will read this very quickly, an arm attack upon the United States; second, an arm attack on the Armed Forces outside of the United States; or an evacuation of U.S. citizens.

So it does specify where the President can use that authority without consulting Congress; otherwise, the President must obtain a Declaration of War or specific statutory authority from Congress. That, again, we think is an important consideration for this committee if you decide to move forward with the bill.

There are four major changes. Second, the Constitutional War Powers Resolution provides for real consultation between the President and the Congress. That is something that I believe, sirs, is missing badly. Real consultation between the President and the Congress.

The War Powers Resolution of 1973 stated that the President should consult with Congress in every possible instance before in-

roducing U.S. Armed Forces into hostilities; however, the decision of who would be consulted was left to the President. Congressmen, I do think that is a huge problem, that maybe is one of the big problems, with the 1973 bill.

This, again, is my opinion and the opinion of experts who helped us draft this bill, which is more important than my opinion. Further reading, the Constitutional War Powers Resolution establishes an executive, legislative, consultive group. In other words, there would be a group formed that we now do not have with whom the President and his senior officials must consult.

See, we don't have that. That does not exist right now. It does not exist. We would mandate if this bill should become law. The members of this group, or the Speaker of the House, President Pro Tem of the Senate and the majority and minority leaders of the House and Senate, this would be the group to be consulted with.

Again, there is nothing in the present law that mandates this. We think it should be mandated. Third, the Constitutional War Powers Resolution reporting requirements is more comprehensive, more comprehensive, than what it is today. The War Powers Act Resolution of 1973, the Constitutional War Powers Resolution, has requirements for the President to issue a report including the estimated scope and duration of hostilities or involvement.

I am not going back to Iraq, but just a moment think about if we had had this language in the 1973 bill and President Bush was required to consult with the leadership of the House and Senate. Would it have changed anything? I don't know. At least the House and Senate would have said we were in discussions with the President, we helped him make this decision. To me, that is absolutely critical.

The Constitutional War Powers Resolution, H.J. Resolution 53, expands this report to include the estimated cost of the hostilities, the assets of the Armed Forces to be used, an assessment of the diplomatic impact on U.S. foreign relations and a detailed assessment of post-hostilities scenarios. Being on the Armed Services Committee for 14 years, you fellows hear the debates on the floor, you know what is being said.

That in itself, if nothing else was adopted, to have the President to sit down with this committee of House and Senate leadership and discuss, well, if we are going in to fight this war, maybe someone would ask the question, well, how about the long-range needs of our military? Mr. President, can we sustain a 2- to 3- or 4-year battle?

Those questions that might have been asked by all of us, but I don't think in that private setting at the White House, the private setting, if that was being asked maybe we would have waited before we decided to go into Iraq and known more what our troops could have done or not done.

The fourth and last point, and I apologize for reading this to you but it is more important than me stumbling through it, Congressional action is not tied to the date a report is received but to the enumerated defensive emergency measures. That means the clock starts whenever the action starts. I will read this just quickly.

Under the War Powers Resolution of 1973, a 60-day clock is triggered when the required report was issued by the President to the

Congress. However, out of 121 deployments into hostilities acknowledged by the executive branch, consistent with the War Powers Resolution, the 60-day clock was triggered pursuant to it just once by the President, that was the Cambodian rescue in 1975, and once by the Congress, which Mr. Rohrabacher talked about earlier, the Lebanon of 1983.

Under the Constitutional War Powers Resolution, H.J. Resolution 53, however, it is immediately triggered when the President exercise his defenses, emergency powers and provides for a 30-day clock within the Congress must declare war, grant statutory authority or extend the 30-day period by law.

Mr. Chairman, that is the last I am going to read to you and close by saying this, and then if you have any questions that I can answer. This, again, is to me critical to the future of this nation. Again, I would give anything to repeal the War Powers Act. I would give anything if I didn't put this in because we didn't need it.

Until we, as a Congress, go back to the Constitution—and the Constitution says that we declare war. I don't know if that will happen in my lifetime. I am 65 now and probably it won't. It should happen that we don't have to have a War Powers Act of any type or any year. This is where we are. We think this is a start.

You have already started, you and the ranking member. This has been a wonderful hearing prior to me. I want to tell you that truthfully I think that what you are going to do for this country, you both should be rewarded, no matter how you might feel today, on this issue. I yield.

[The prepared statement of Mr. Jones follows:]

PREPARED STATEMENT OF THE HONORABLE WALTER B. JONES, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Chairman Delahunt, Ranking Member Rohrabacher, Members of the Committee: Article I, Section 8 of the U.S. Constitution grants the Congress the sole authority to declare war. In 1793, James Madison said: “. . . The power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature . . .”

Congress last declared war in 1942, during World War II. Since then, Presidents of both parties have engaged in conflicts such as Korea, Vietnam, Bosnia, Haiti and Somalia without the express consent of Congress.

We have a dysfunctional framework for the decision to make war. The War Powers Resolution of 1973 attempted to address this issue, but has failed to meet its intended purpose.

The purpose of the Constitutional War Powers Resolution (H. J. Res. 53) that I have introduced is to improve upon the War Powers Resolution of 1973 and to rededicate Congress to its constitutional role in deciding when to use force abroad while still preserving the nation's ability respond to 21st century threats.

The Constitutional War Powers Resolution addresses future conflicts and will have no effect on the wars in Iraq or Afghanistan.

There are *four* major changes that the Constitutional War Powers Resolution makes to improve upon the War Powers Resolution of 1973.

- *First, the Constitutional War Powers Resolution distinguishes between where congressional approval is required and where it is not.* Under the War Powers Resolution of 1973, the President could act in any instance without prior congressional approval. Under H. J. Res. 53, the President may authorize the use of our Armed Forces prior to congressional approval only if one of the following events occur:
 - An armed attack upon the United States
 - An armed attack on the Armed Forces outside the United States, or
 - An evacuation of U.S. Citizens.

Otherwise, the President must obtain a declaration of war or specific statutory authorization from Congress.

- *Second, the Constitutional War Powers Resolution provides for real consultation between the President and the Congress.* The War Powers Resolution of 1973 stated that the President should consult with Congress “in every possible instance” before introducing U.S. Armed Forces into hostilities. However, the decision of who would be consulted was left to the President. The Constitutional War Powers Resolution establishes an Executive-Legislative Consultative Group with whom the President and his senior officials must consult. The members of this group are the Speaker of the House, President Pro Tempore of the Senate, and the Majority and Minority Leaders of the House and the Senate.
- *Third, the Constitutional War Powers Resolution’s reporting requirement is more comprehensive.* Like the War Powers Resolution of 1973, the Constitutional War Powers Resolution has requirement for the President to issue a report including the “estimated scope and duration of hostilities or involvement” prior to hostilities. The Constitutional War Powers Resolution expands this report to include the estimated cost of the hostilities, the assets of the Armed Forces to be used, an assessment of the diplomatic impact on U.S. foreign relations, and a detailed assessment of post-hostilities scenarios.
- *Fourth, Congressional action is not tied to the date a report is received, but to the enumerated defensive/emergency measures.* Under the War Powers Resolution of 1973, a 60-day clock is triggered when the required report was issued by the President to the Congress. However, out of 121 deployments into hostilities acknowledged by the Executive Branch “consistent with” the War Powers Resolution, the 60-day clock was triggered “pursuant to” it just once by the President (Cambodian rescue, 1975) and once by the Congress (Lebanon, 1983). Under the Constitutional War Powers Resolution, however, it is immediately triggered when the President exercises his defensive/emergency powers and provides for a 30-day clock wherein the Congress must declare war, grant statutory authorization, or extend the 30 day period by law.

Chairman Delahunt, Ranking Member Rohrabacher, thank you for holding this important hearing.

Mr. DELAHUNT. Well, thank you very much, Walter, and thank you for that explanation. I am sure that your words hopefully will be repeated on C-SPAN or some other mode of communication, if you will, so that the public is aware of what I think we all consider a very serious issue, an issue with profound consequence and that Congress is stirring because it is about the future and how we proceed.

Several of the provisions that you allude to really go to the issue of accountability. It is not simply accountability to Congress, it is accountability to the people of the United States and an explanation in full measure of why, and what is the cost going to be, and what are the ramifications and the implications for our country, all of which I think are questions that they have earned the right and that they have the Constitution to support the exercise of that right to be answered.

Mr. JONES. Mr. Chairman, I couldn’t agree more. To me, and it was said by the first panel and many of you on this dais today, that the whole key, the American people I think felt like we did not meet our constitutional responsibility. They challenged why we were not more in consultation with the administration.

I am not even going to blame the administration on that. They were going by the 1973 War Powers Act. That is what they were told by the attorneys to follow, they did. I can’t dispute. Just thinking about the power of having the leadership of the House and Senate.

I know, as the President, if I was the President, that I am going to have to consult with these leaders, I am going to have to make sure that I answer the questions that they were asking me about duration, about are our troops ready to go for a long, extended period of time? So there, again, I thank you.

Mr. DELAHUNT. Well, I don't have any questions, but be assured that myself, and Mr. Rohrabacher and this committee will be consulting with you, seeking your ideas. Just know that we are grateful to you.

Mr. JONES. Thank you, sir.

Mr. DELAHUNT. Dana?

Mr. ROHRABACHER. I will just close with this, that there is many Americans who have lost faith in the Congress, as well as the executive branch. Congress, by the way, is held in lower esteem than the President right now. I think it is because a lot of people in our country don't believe that we care about them at all, that we don't really care.

We are here, and they think that we are just here to have a good job, and for ego purposes or whatever, and that we are not watching out for their interests and that we are watching out for other things, maybe we have a globalist concept where we are concerned about the globe and by other peoples of the world or perhaps special interests that are domestic, that are very powerful.

The people think that those are the things that go into our decision making. I may disagree with the procedural recommendations and disagree that what we have here is a procedural problem that needs to be solved. I do know that both the chairman and Walter Jones care deeply about Americans and about American service people in particular.

I know that Walter's main motive is he is watching out for his Marines. He is watching out for the people in his district, and I hope they deeply appreciate that—

Mr. JONES. Thank you, sir.

Mr. ROHRABACHER [continuing]. Because you are doing that with your heart and soul and taking a great political risk because you want to protect them from what you see as folly, so I respect that. I want to also point out that the chairman, at somewhat taking odds at some of the other people in his half of the House there and his side of the aisle, decided to look into the Ramos-Compean event.

That is because he cared about two guys who were in prison, perhaps unjustly accused, and he cared about them and wanted to see about that situation. I think that is what we have to always keep in mind, the Ramos and Compeans, and the Marines who were blown to pieces in Beirut, and the Marines who are now up on their front lines.

We are going to make sure that we watch out for their interests, and that is what this is all about. I thank you very much, Mr. Chairman and Mr. Jones.

Mr. JONES. Mr. Chairman, if I could speak very quickly. I want to thank you as well. I didn't think about this earlier. Mr. Rohrabacher, thank you for your leadership on the Ramos-Compean. Mr. Chairman, you certainly have been there for them. The Amer-

ican people understand that two men are sitting in jail right now. That was an injustice that needs to be corrected.

So thank you for what you have done, and thank you again for this opportunity to speak about this issue.

Mr. DELAHUNT. We are adjourned.

[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]

